Vol. 87

Vol. 87

87 I.A. 24

No. 67-21 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETER J. PALOMBI, Plaintiff-Appellant, v. SYLVIA A. KAMP, PRISCILLA D. BAUCH, MYRTLE V. FLYNN, THERESE M. INGRASSIA, PHILIP OLIVERI, DOROTHY HARRINGTON and EUGENE ZANIN, Defendants-Appellees.	)	Appeal Circuit Court Winnebago County

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

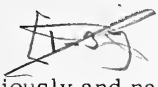
The plaintiff (appellant here) appeals from a judgment order entered on January 5, 1967, by the Circuit Court of the 17th Judicial Circuit, Winnebago County, that dismissed his amended complaint.

The amended complaint charged that the defendants were employed as teachers at the Evergreen School, Winnebago County, during the 1965-66 school year and that they had, on or about March 8, 1966, "willfully and maliciously composed and published . . . . certain defamatory and false matter . . ." about the plaintiff. It further alleged that the plaintiff was a school superintendent by profession and had been the superintendent of Evergreen School during the school year of 1964-65 and, that as a result of the publication, he was "greatly injured in his reputation and profession . ." The allegedly defamatory material was contained in a petition signed by the defendants and mailed to a member of the Board of Education of the

school district. The petition was attached to and made a part of the amended complaint. For the most part, the petition was a request that the Board reconsider its dismissal of a Mr. Rowley as the then superintendent of Evergreen School. It makes no mention of the plaintiff by name but does compare Rowley with ". . . our previous administrator, who fought with the pupils, teachers, and parents and at times didn't even bother to speak to them." The petition also stated that: "It has been a welcome change to have a superintendent who . . . has not cursed us, and has not exhibited fits of temper or other emotional explosions when asked to discuss a problem or answer a question." This allegation, however, in itself, makes no reference to any particular prior superintendent or superintendents.

The complaint charged that the Board was aware that the remarks concerning the prior administrator referred to the plaintiff and that the statements were wholly false. No specific damages were pleaded.

The judgment order sustained the defendant's motion to dismiss the amended complaint and found that the allegedly libelous statements contained in the petition were not defamatory per se, that they did not defame the plaintiff in his business or occupation, and that the petition was a privileged communication between the defendants and the Board of Education.



A publication is considered libelous per se if it is "so obviously and naturally hurtful to the person aggrieved that proof of its injurious character can be, and is, dispensed with." Reed v. Albanese, 78 Ill. App. 2d 53, 58. Ordinarily, any defamatory material that tends to injure a person in his business or profession is considered libelous per se and, therefore, it is not necessary to allege or prove specific damages. Cowper v. Vannier, 20 Ill. App. 2d 499, 501. Clifford v. Cochrane, 10 Ill. App. 570, 574. However, it is for the trial court in the

first instance to construe the words alleged to constitute the libel in their normal and ordinary meaning to determine if they are libelous per se. Hambrick v. Field Enterprises, Inc., 46 Ill. App. 2d 355, 362.

The words contained in the petition published by the defendants did not charge the plaintiff with any crime or immorality. Neither did they state that the plaintiff was inefficient or incompetent in his chosen profession. They imputed no inability in his performance as superintendent nor charged any lack of integrity. At most they implied that the relationship between the plaintiff and some of the teachers was not always harmonious during the 1964-65 term; that the plaintiff was vigorous and severe in his dealings with the teachers, pupils and their parents; but, the allegedly libelous words did not indicate that the plaintiff's conduct was without reason or provocation.

We cannot say that the plaintiff was obviously and naturally injured by those allegations. It is not inconceivable that a school superintendent might be more effective in his profession if his relations with his teachers, pupils and their parents were, at times, a little less than cordial. In any event, we do not disagree with the conclusion of the trial court that the words used by the defendants in their petition were not libelous per se. This being so, it was necessary for the plaintiff to allege, and ultimately to prove, specific damages as a result of the libel and his failure so to do made his complaint vulnerable to a motion to dismiss.

We conclude that the judgment of the trial court was correct and should be affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and MORAN, J. concur.

87 I.A.3 73

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10813 Agenda No. 67-22

Charles A. Rutledge,

Plaintiff-Appellee,

vs.

Chism, Incorporated, a Delaware Corporation,

Defendant-Appellant,

and

Charles J. Gilbert, d/b/a Gilbert Trucking and Excavating,

Defendant-Appellee

Appeal from Circuit Court Sangamon County

TRAPP, J.

The defendant, Chism, Incorporated, appeals from a judgment entered on a jury verdict for $8,600.00 in favor of the plaintiff, Rutledge, for personal injury.

The plaintiff, Rutledge, was a supervising employee of Stehman Wrecking Company in the demolition of a house. In this operation Stehman rented a crane from defendant, and trucks from one Gilbert, upon the basis of hourly rental. The rent of the crane included the machine, its operator and an oiler. In the case of the truck, rental included the truck and its driver. Chism, Incorporated, is herein referred to as defendant

The tailgate of a truck operated by one Jones came

loose. Such tailgate weighed 500 pounds, and when not closed, it was suspended by chains.

Jones asked the plaintiff and others to help him reposition the tailgate. Plaintiff testified that Elmore, defendant's crane operator, told the oiler to get a choker cable and "We'll just lift it up with the crane and not have to lift it". The operator did not testify as to whether he was directed to help lift the tailgate or volunteered to do so. Jones, the truck driver, testified that plaintiff did not request the use of the cable to lift the tailgate.

The oiler looped the choker cable around the end gate, placing the eye of the cable over a tooth in the bucket of a crane. Such bucket was then closed and the tailgate lifted into place. As the tailgate was lifted, plaintiff and the oiler pushed it in, and at plaintiff's suggestion, the truck driver went around the truck to push the lever locking the tailgate. It appears that before he pushed the lever, the gate fell, injuring the plaintiff's hand.

Plaintiff testified that one tooth on each side of the bucket went through the cable eye. Elmore, the operator, testified that the eye of the cable was only large enough for one tooth to go through it. Jones, the trucker, testified that the cable was hooked on a tooth of the bucket which was then closed.

After the injury the cable was on the ground, the eye having come off of the bucket in some manner.

All witnesses agree that the only way in which the

bucket can be opened is by use of a lever in the cab of the crane. The crane operator disagrees with the truck driver as to the possibilities of the cable coming loose. The operator testified that the clam shell closes except for 3/8ths of an inch, and that the cable could slip if the truck or tailgate moved. He testified the bucket was closed completely at the time of the injury, but he could not see whether the cable was all of the way on the tooth or teeth, or only partially so.

Jones, the trucker, said that the truck was in gear with the brake on and did not move during the operation, and he testified that the only way that the tailgate could fall was for the operator to push the wrong lever causing the bucket to open.

We find no testimony describing how well the eye of the cable was fastened over the tooth or teeth of the bucket, and there is no testimony that anyone saw it come loose.

Defendant urges that the evidence does prove that the cable came loose by reason of the operator's moving a lever in the cab, and that the facts fit the theory equally well that the cable slipped from the tooth of the bucket. He contends that the existence of a fact cannot be inferred from the evidence when the existence of another inconsistent fact can be inferred with equal certainty. Ohio Bldg. Vault Co. v. Indus. Board, 277 Ill. 96, at p. 102; 115 N. E. 149; O'Connor v. Aluminum Ore Co., 224 Ill. App. 613; Coulson v. Discerns, 329 Ill. App. 28; 66 N. E.2d 728; Pure Torpedo Corp. v. Nation, 327 Ill. App. 28; 63 N. E.2d 600; Broughton v. Smart, 59 Ill.

440; and Dorris v. Barrett, 413 Ill. 109; 107 N. E.2d 845.

The testimony of the two witnesses directly conflicts and so little evidence is given as to a crucial point that we are unable to examine it in any detail. The truck driver was apparently in a better position to see how well the cable was attached, and he stated that the only way the cable could fall was for the operator to push a lever on the crane. The operator says the bucket did not open but he does not say whether this judgment is based upon observation of fact, or upon his belief that he did not touch the lever. While he does not say that the truck moved, or the tailgate moved, he says that either could have moved so that the cable would slip free without the bucket opening. It appears that he did not see the choker cable as it was placed over the tooth of the bucket. Under the facts the jury could decide that the trucker had a better view of the cable as it was hooked to the bucket, and accepted his statement that the cable could not come off unless the bucket was opened. The fact that the evidence is close and conflicting does not invalidate the jury's conclusion when there is some evidence, which taken most favorably in support of the verdict exists to support such verdict.

Defendant urges that the record demonstrates that the plaintiff was guilty of contributory negligence as a matter of law.

Defendant's authorities are decided upon facts of different quality. In Withey v. Illinois Power Co., 32 Ill. App.2d 163; 177 N. E.2d 254, the plaintiff had placed a tele-

vision tower within 8 feet 6 inches of a 2400 volt electric line and was injured when a five foot antenna which he was removing from the top of the tower came in contact with the line. The court held that his action in the face of known danger was contributory negligence as a matter of law. In Sumner v. Griswold, 338 Ill. App. 190; 86 N. E.2d 844, the court held that failure to look for and see a wagon on a highway which had a white rear light instead of a red rear light was contributory negligence as a matter of law. In Carter v. Winter, 32 Ill.2d 275; 204 N. E.2d 755, the court held that plaintiff's action in turning a comparatively slow moving car into a lane of traffic occupied by a car travelling 75 to 80 miles per hour when the fast car was 120 feet away, was contributory negligence as a matter of law. In Dee v. City of Peru, 343 Ill. 36; 174 N. E. 901, the court held that the failure to see a barrier across a bridge which was clearly visible at least 110 feet away was contributory negligence as a matter of law under the facts and circumstances of the case. Defendant herein contends that the present case is a similar case of a person entering a situation of known danger. We do not agree that reliance upon a skilled crane operator, as in this case, presents a situation of unreasonably embarking upon a known danger. The question of contributory negligence in this case was a proper question for the jury.

Defendant urges that the trial court erred in refusing to permit the jury to consider whether or not Elmore was a

servant loaned to Stehman, and a fellow employee of the plaintiff. He contends that such issue is always a jury question.

Under the facts of this case the only question is whether the rental of the crane by the defendant wholly removed Elmore from Chism's employment and made him an employee of Stehman. Gundich v. Emerson-Comstock Co., 21 Ill.2d 117; 171 N. E.2d 60.

The operator and oiler provided by the defendant with the crane were its full time employees. Stehman's foreman could tell the crane operator what work should be done and when, but could not hire or discharge the operator. There is no evidence that Stehman could, or attempted to direct the manner of operation of the crane, or that he even gave any signals instructing or directing the operator. Chism paid the wages, Social Security and insurance for its employees, i.e., the operator and oiler, and there is no evidence suggesting any change in the relationship of Elmore as an employee of the defendant by reason of the renting of the crane.

Where the facts relating to the employment and control are undisputed, it becomes a question of law as to whether or not a party loans his employee. Densby v. Bartlett, 318 Ill. 616; 149 N. E. 591; Merlo v. Public Service Co., 381 Ill. 300 at 319; 45 N. E.2d 665.

The authorities cited by defendant disclose issues of fact necessarily considered in determining whether or not there was a loaned employee. In Murphy v. Lindahl, 24 Ill. App.2d

461; 165 N. E.2d 340; Gundich v. Emerson-Comstock Co., 21 Ill. 2d 117; 171 N. E.2d 60; Allen-Garcia Co. v. Industrial Com., 334 Ill. 390; 166 N. E. 78; Merlo v. Public Service Co., 381 Ill. 300; 45 N. E.2d 665, each case contains issues of fact arising under evidence concerning one or more of the factors of the manner of hiring, the mode of payment, the right to discharge and the right and manner of control of the operation. Most of the cases include the factor that the operator of the machine was not a regular employee of the defendant who supplied the equipment.

The trial court did not err in its refusing to permit the issue of loaned servant to go to the jury.

The judgment of the trial court is affirmed.

CRAVEN, P. J. and SMITH, J. concur.

87 I.A. 2 80

Gen. No. 66-119 Agenda No. 28

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

JAMES SPURGEON and NORMA SPURGEON, Plaintiffs-Appellees, vs. KENT-REBER REAL ESTATE COMPANY, INC., JERALD E. KENT, PATRICIA L. KENT, and MADISON COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION, a Corporation, Defendants-Appellants.	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

DOVE, J.

On September 1, 1961, the plaintiffs, James Spurgeon and Norma Spurgeon, his wife, entered into a written contract with the defendant, Kent-Reber Real Estate Company, Inc., which provided that the defendant, Real Estate Company, referred to as the seller, would construct a dwelling house in Granite City, at a described location, for $19,275.00. This dwelling is hereafter referred to as the Westchester property, and was to be an exact duplicate of a display home previously erected by the seller on Edgewood Drive, except for certain changes set forth and specified in the contract. The contract also provided that the seller would take the property owned, and occupied by the plaintiffs, and located at 2557 Boyle Avenue, Granite

City, Illinois at $18,500.00, less $1797.00, indicated in the contract as commission, FHA discount, and trade fees. The contract then provided:

> "Kent Realty is to list 2557 Boyle for $18,450.00 for ninety days, and Mr. Spurgeon will realize the benefit of any extra money, if sold at this price. Mr. Spurgeon will need a loan of $9,500.00 and will pay the closing cost and difference in money needed in cash. Mr. and Mrs. Spurgeon will, upon approval of their loan, deposit $1000.00 cash or the deed to their house to Kent Realty. Mr. and Mrs. Spurgeon will continue to live in 2557 Boyle until their new home is completed and will not have to make two payments at the same time-----. At the time of payment in full of the purchase price, the seller shall convey to the purchasers the property described herein, free and clear of all incumbrances by a deed of general warranty, with a certificate of merchantable title, and said purchasers shall then and not before have immediate possession of the property for the purpose of residence."

Attached to and made a part of the contract was the following:

> "House to be built to exact design and specifications as Display House, except as follows: Spurgeon's house to have cove ceilings in living room, dining room and hallway, none in bedrooms. Kitchen to have soffit with clock receptacle above cabinets. Living room and hallway to have plywood rather than hardwood flooring. (A credit will be issued for the difference between hardwood flooring and plywood flooring. Front door to be of picture frame variety, rather than plain slab door. House to have square gutters of galvanized iron, unpainted. Interior partition walls to have double floor joists. Main girder to have three (3) supporting steel posts. Hot water tank to be of 40-gallon capacity. No interior or exterior painting is to be done, except for floor finish. Yard is to be graded but not seeded. It is understood that the furnace will be of 80,000 BTU input capacity. The air conditioner will be of two-ton capacity. The interior of garage will be plastered. The garage floor and driveway will be wire-reinforced concrete. Brick used will be pink with stone strim around front entrance door."

On December 13, 1961, the purchasers caused to be delivered to the seller, Kent-Reber Real Estate Company, Inc. a notice of their rescission of this contract. The

notice setting forth the following reasons for so doing:

> "1. Failure to give possession of the premises to the undersigned (purchasers), within three months from the date of contract.
>
> "2. Poor workmanship in the basement floor and walls.
>
> "3. Use of plywood instead of planking under the hardwood floors.
>
> "4. Use of single floor joists instead of double floor joists.
>
> "5. Failure to make reasonable efforts to sell the home of the purchasers, located at 2557 Boyle Ave., Granite City, Illinois".

On April 23, 1963, the purchasers, James Spurgeon and Norma Spurgeon, filed the instant verified complaint, which alleged the execution of the contract on September 1, 1961, and averred, among other things, that the seller orally promised the plaintiffs that possession of the dwelling house referred to in the contract would be delivered to plaintiffs ready for occupancy within 90 days from September 1, 1961. It was further averred that on September 21, 1961, the plaintiffs executed a deed to their Boyle Avenue property and delivered the same to Kent-Reber Real Estate Company, Inc., understanding that said conveyance would be held in escrow by the grantee, as provided by the contract, until a loan was obtained for the plaintiffs upon the real estate they had agreed to purchase from the Real Estate Company.

The complaint then alleged that the Real Estate Company, in violation of its agreement, conveyed the property described in this deed to defendants, Jerald E. Kent and Patricia L. Kent, who, on the same day, executed a mortgage thereon to defendant, Madison County Federal Savings and Loan Association to secure a $14,500.00 loan.

It was also alleged that the Real Estate Company violated the terms and conditions of said contract by failing to give possession of the Westchester property within three months from the date of the contract; that the Real Estate Company also failed to make reasonable efforts to sell the Boyle Avenue property, and used plywood instead of planking under the hardwood floors, and used single floor joists instead of double ones.

The complaint also alleged that the title to the Boyle Avenue property was acquired by the plaintiffs on November 18, 1958; that in order to pay for the same, plaintiffs borrowed $8300.00 from State Loan and Savings Association, and executed to said Association a note for that sum dated January 5, 1959, and secured the payment thereof by a mortgage upon the said property. It was then averred that on December 22, 1961, Jerald E. Kent and Patricia L. Kent paid to said State Loan and Savings Association the amount due thereon at that time, and that said Loan Association duly released said mortgage of record.

The prayer of the complaint was that the Court order and decree: (a) that the sales contract dated September 1, 1961, be rescinded; (b) that the defendants, Jerald E. and Patricia L. Kent, be directed to convey to plaintiffs the Boyle Avenue property; (c) that these defendants be directed to forthwith pay and discharge their obligation to the Madison County Federal Savings and Loan Association; (d) that by reason of the discharge of the mortgage indebtedness on the Boyle Avenue property by Jerald E. and Patricia L. Kent, that the liabilities and equities between plaintiffs and these defendants be adjusted; and (e) that a money judgment for $10,000.00 be rendered in favor of the plaintiffs and against Jerald E. Kent, Patricia L. Kent and Kent-Reber Real Estate Company, Inc.

To this complaint the defendants, Jerald E. Kent, Patricia L. Kent and Kent-Reber Real Estate Company, Inc., filed a joint

answer, admitting the execution of the contract on September 1, 1961, and many other allegations of the complaint. Their answer also admitted the receipt of the notice of rescission, but specifically denied there was any basis therefor.

The defendant, Kent-Reber Real Estate Company, Inc., filed a counterclaim alleging the execution of the contract on September 1, 1961, and averred that the dwelling house was constructed by counterclaimant in accordance with the terms of the contract. The counterclaim charged that counterdefendants refused to execute the mortgage papers and other related documents in order to consummate the contract, thereby breaching said contract. The counterclaim alleged that pursuant to the provisions of the contract, counterdefendants executed a deed to the Boyle Avenue property for the use of counterclaimant and Jerald E. and Patricia Kent to provide financing to carry out the provisions of the contract; that this property was to be used by Jerald E. Kent and Patricia L. Kent to obtain a loan from Madison County Federal Savings and Loan Association; that from the proceeds of said loan, the balance due the State Loan and Savings Association was paid.

The counterclaim then averred that it constructed the Westchester dwelling in accordance with the provisions of the contract, but that plaintiffs wrongfully attempted to rescind the same.

The counterclaim then charged that the plaintiffs had never relinquished possession of the Boyle Avenue property, averred that the plaintiffs had made no payments of rent to counterclaimant or any other payments of any kind on the Boyle Avenue property, and averred that counterclaimant had paid all of the taxes, insurance, interest and mortgage payments on said property since October 1961, and also paid interest and other expenses on the Westchester property through April 1963, aggregating $3612.11. The counterclaim prayed for a money judgment against the plaintiffs for $6477.80.

By their reply to the counterclaim, plaintiffs admitted they were in possession of the Boyle Avenue property, and averred that possession of their deed to this property was fraudulently obtained by counterclaimant. The issues made by the pleadings were heard by the Court, resulting in the rendition of a money judgment in favor of the plaintiffs and against Kent-Reber Real Estate Company, Inc., Jerald E. Kent and Patricia L.Kent, for $6067.05. The trial court entered an order finding that the property plaintiffs agreed to purchase, referred to in the record as the Westchester property, was being constructed, at the time of the rescission of the contract, in substantial compliance with the contract of the parties, and that the damages Kent-Reber Real Estate Company sustained by reason of plaintiffs' wrongful rescission of the contract, was $3158.61. The Court also found that the mortgage held by the Madison County Federal Savings and Loan Association on the Boyle Avenue property was a subsisting, valid first lien upon that property; that the amount unpaid thereon, at the time the judgment order was rendered, May 31, 1966, was $17,956.67; and directed Jerald E. Kent and Patricia L. Kent to convey to plaintiffs the Boyle Avenue property, subject to the mortgage thereon held by the Madison County Federal Savings and Loan Association.

To reverse this judgment order, Kent-Reber Real Estate Company, Inc., Jerald E. Kent and Patricia L. Kent appeal, and the plaintiffs filed a cross-appeal requesting this Court to increase the money judgment rendered by the trial court in their favor to $10,678.43, and to hold that the Boyle Avenue property is not subject to the lien created by the mortgage thereon, which had been executed by Jerald E. and Patricia L. Kent.

The evidence discloses that on September 1, 1961 the contract was executed as alleged in the complaint; that at that time Jerald E. Kent was the president of the Kent-Reber Real Estate Company, Inc. and the owner of all the capital stock of this corporation except 20 shares; that on September 13, 1961 an application was made by Jerald E. Kent to Madison County Federal Savings and Loan Association for a loan on the Boyle Avenue property, the title to which was then in the plaintiffs, who were then, and at all times thereafter, in possession thereof as their homestead; that thereafter, on September 21, 1961, the plaintiffs executed a deed to the Boyle Avenue property to Kent-Reber Real Estate Company, and on October 16, 1961 Kent-Reber Real Estate Company conveyed this property to Jerald E. Kent and Patricia L. Kent, who thereafter executed their note to Madison County Federal Savings and Loan Association for $14,500.00, and secured its payment by a mortgage on the Boyle Avenue property. From the proceeds of this loan $7278.24 was used to discharge the amount unpaid the State Loan and Savings Association on its lien on this property, and the balance, less deductions for loan expenses, was paid to Kent-Reber Real Estate Company, and was expended by it in the construction of the residence which plaintiffs had agreed to purchase.

The evidence disclosed and the trial court found that the dwelling which plaintiffs had agreed to purchase was completed in July 1962; that at the time plaintiffs gave notice of their rescission of the contract the dwelling was being constructed, and when completed was in substantial compliance with the contract of the parties, and therefore plaintiffs were liable to the Real Estate Company for the wrongful rescission of the contract and that the damages

which the Real Estate Company sustained, because of the rescission of the contract, and the delay in the sale of the Westchester property was $3158.61, being the amount of the interest, taxes and loan expense in connection with the sale of the Westchester property.

The evidence further disclosed, and the trial court found, that in April 1963, the Real Estate Company sold the Westchester property to Mr. and Mrs. John Smith for $21,500.00, which was $2225.00 in excess of the amount the Real Estate Company had agreed to sell the same to the plaintiffs. The trial court then deducted from the damages of $3158.61, which the court found the Real Estate Company had sustained, the sum of $2225.00, the difference being $933.61.

The trial court then found that the plaintiffs did not learn of the mortgage on their Boyle Avenue property until the Spring of 1962, and that since December 1, 1962, the plaintiffs have paid no taxes, rent or insurance on said premises; that the contract of the parties did not authorize the Real Estate Company to convey the Boyle Avenue property to Mr. and Mrs. Kent, and did not authorize the Kents to mortgage this property; that the conduct of these defendants in so doing constituted a breach of trust, or an overreaching of the plaintiffs, by these defendants, and that the plaintiffs were entitled to recover of defendants their damages sustained thereby. The Court found that the amount remaining unpaid upon the mortgage held by State Loan and Savings Association in December 1961, on the Boyle Avenue property was $7278.24, and that the amount remaining unpaid upon the mortgage held by Madison County Federal Savings and Loan Association, on this same property, on May 31, 1966 was $17,966.67; the difference being $10,678.43. The Court also found that the defendants had paid the taxes upon the Boyle Avenue property, amounting to $1365.08, and insurance thereon, amounting to $ 297.68, and were entitled to be credited with these amounts, together with

interest upon the amount which these defendants paid the State Loan and Savings Association for and on behalf of plaintiffs from October 1961, at the rate of 6% per annum, amounting to $2015.11. These several items aggregate $3677.87 and deducting this amount from said $10,678.43 leaves $7000.66. By offsetting the damages which the Court found defendant Kent-Reber Real Estate Company, Inc. had sustained $933.61 against the damages plaintiffs sustained leaves $6067.05, and it was for this amount the Court rendered judgment in favor of the plaintiffs and against the defendants, Kent-Reber Real Estate Company, Inc., Jerald E. Kent and Patricia L. Kent.

It is insisted by counsel for appellants that this judgment is against the weight of the evidence and that inasmuch as the trial court found that the Westchester home was, at the time plaintiffs rescinded the contract, being constructed in substantial compliance with the terms of the contract, that the trial court erred in rendering any judgment against the defendants, and that their motion to dismiss the action at the close of all the evidence should have been sustained.

In their argument, counsel for appellants, say:

"There is nothing in the contract which states plaintiff's property cannot be mortgaged by Kent-Reber Real Estate Company. Conversely, the contract states the property is being taken in on trade, andin the absence of any reservation or condition in the warranty deed conveying title, it would be presumed that the owner could mortgage its own property"

Counsel then continues "The plaintiff, having wrongfully rescinded and wrongfully refused to abide by the written agreement, loses his down payment or what money has been advanced in part payment. In this instance he traded in his old home, and gave defendant a warranty deed to it. This home was valued at $18,500.00, and had a mortgage against it of $7,278.24. This mortgage was paid off by Kent-Reber and a new mortgage was placed against the property in the amount of $14,500.00. The new mortgage

was placed of record on October 16, 1961. The amount of money advanced then by the plaintiff is the difference between their existing mortgage of $7,278.24 and the new Mortgage of $14,500.00, or $7,221,76, and this sum of money, or any damages claimed, should be forfeited as plaintiff was the wrongdoer".

The contract of September 1, 1961 recited that plaintiffs would need a loan of $9500.00 on the Westchester property, which they had contracted to purchase and that upon the approval of such a loan the plaintiffs would "deposit $1000.00 cash or the deed to their house". Jerald Kent testified that on September 15, 1961 he submitted a loan application to Madison County Federal Savings and Loan Association on the Boyle Avenue property and at the same time applied to First Granite City Savings and Loan Association for a construction loan on the Westchester property and he thought the amount of this construction loan was $10,000.00. Mr. Kent went on to say, "We apparently missed getting Mr. Spurgeon to sign the loan application". Mr. Spurgeon testified that he made no application for any loan on the Westchester property but was told that a loan on the Westchester property had been approved and on the same day he and his wife executed their deed to the Boyle Avenue property and deposited it with the Realty Company as the contract provided.

Upon the hearing of this case, Jerald E. Kent testified that this provision to deposit the deed or $1000.00 cash was inserted in the contract so that the plaintiffs "would not back out from buying the house (the Westchester property), after we had a chunk of money in it."

The Kent Reber Real Estate Company was not warranted in treating the deed it received from appellees to the Boyle Avenue property as an absolute conveyance, and there was nothing in its contract with plaintiffs which justified it

in conveying this property to Jerald E. and Patricia L. Kent nor could Jerald E. and Patricia L. Kent treat the deed they received from the Realty Company as an absolute conveyance to them. They were aware of the provisions of the contract of September 1, 1961 and their action in executing a mortgage upon the Boyle Avenue property to the Madison County Federal Savings and Loan Association was wrongful as was the action of the Realty Company in conveying this property to Jerald E. and Patricia L. Kent and the plaintiffs were entitled to recover in this proceeding the damage they sustained by reason of such wrongful conduct.

The complaint filed by plaintiffs not only sought a money judgment for the damages they sustained, but also sought a rescission of the contract of September 1, 1961, a conveyance of the Boyle Avenue property to them, and an adjustment of the rights, obligations, liabilities and equities of the parties. The relief afforded appellees was in accordance with the prayer of their complaint and the findings and judgment of the trial court are supported by the evidence found in this record.

By their cross-appeal appellees insist that the trial court erred in decreeing that the mortgage to Madison County Federal Savings and Loan Association is a valid lien upon the Boyle Avenue property. Counsel argue that appellees were in possession of this property at all times and if any inquiry had been made by this mortgagee, it would have learned that appellees deed to the Realty Company was to be held by the Realty Company as a deposit only as the contract of September 1, 1961 provided: that since no inquiry was made, equity requires that this mortgage be decreed not a lien on the Boyle Avenue property. To so decree would be highly inequitable. The Loan Association had a right

to rely on the records and in good faith, consummated a loan in the usual and customary way such transactions are handled. With the proceeds of this loan, the balance due on the lien of the State Loan and Savings Assocation, which had been placed thereon by appellees was discharged and this mortgage was released of record. The trial court directed the holders of the legal title to the Boyle Avenue property to convey the same to appellees, adjusted the equities of the parties and an equitable adjustment required that the mortgage held by Madison County Federal Savings and Loan Association be decreed a subsisting lien on the Boyle Avenue property.

Neither is there any merit in appellees contention that they had a right to rescind the contract because the Westchester property "was not completed within the period set forth for completion which was to be between 90 and 120 days". The agreement of the parties contained no specified completion date, and less than 120 days had elapsed from the date of the contract to the date of the rescission notice.

The record shows that the Realty Company accepted and acted upon this notice of rescission and subsequently in April 1963 realized a profit from the sale of the Westchester property. Inasmuch as the plaintiffs had refused to be bound by this contract, the Realty Company was entitled to recover its damages, and the findings of the court on this feature of the care are fully sustained by the record.

At the time this complaint was filed and at the time the decree was entered, the title to the Boyle Avenue property was vested in Jerald E. and Patricia L. Kent, subject to a first

mortgage lien thereon held by the Madison County Savings and Loan Association. The amount unpaid on this lien on May 31, 1966 was $17,956.67. The trial court found that the plaintiffs were entitled to have the title to the Boyle Avenue property reinvested in them; that the lien of Madison County Federal Savings and Loan Association was a valid and subsisting first lien thereon; and that the amount remaining unpaid to said Loan Association, at the time the judgment order was entered herein, upon their home, was $10,678.43 in excess of the amount they were obligated to pay to the State Loan and Savings Association in December, 1961. The Court in adjusting the equities of the parties then offset the damages which the court found defendants had sustained by reason of plaintiffs' wrongful conduct, amounting to the sum of $933,61, and credited defendants as indicated and rendered judgment in favor of the plaintiffs and against them for $6067.05.

The evidence sustains the findings and judgment of the trial court and the judgment order appealed from is affirmed.

Judgment Order Affirmed.

EBERSPACHER and GOLDENHERSH, JJ., concur.

PUBLISH IN ABSTRACT ONLY.

87 I.A.2 81 (1)

No. 66-137

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

COMMONWEALTH LOAN COMPANY, a Corporation, Plaintiff-Appellee, vs. JAMES W. BAKER, Defendant-Appellee, and GENERAL STEEL INDUSTRIES, INC., a Corporation. Garnishee-Appellant.	Appeal from the Circuit Court of Madison County, Illinois. Honorable William E. Johnson, Judge

EBERSPACHER, J.

On February 25, 1964, the plaintiff, Commonwealth Loan Company, obtained judgment by confession against James W. Baker in the amount of $771.68 and costs of suit. Thereafter the plaintiff served a garnishment summons upon the garnishee, General Steel Industries, Inc., together with interrogatories. In answer to the interrogatories, the garnishee answered that it held no property of the judgment debtor when served with the summons. The plaintiff then caused a citation writ to discover assets to be served upon the judgment debtor. Upon the hearing thereof the judgment - debtor testified that the garnishee was holding some $800.00 under some type of retirement benefit arrangement. The garnishee had no notice of nor was it represented at the citation hearing. At that hearing the judgment - debtor contended and the court found that the funds held by the garnishee were exempt from garnishment under the provisions of Chap. 52, Section 13, Paragraph 2, Ill. Rev. Stat., and ordered that:

". . . General Steel Industries, Inc., a corporation, Granite City, Illinois, turn over to the defendant James W. Baker such sums as are in their custody standing in his name or credit to his account without regard to any Garnishment proceeding now pending."

Commonwealth Loan Company appealed that order to this Court; General Steel, the garnishee, responded to the appeal by filing a motion to dismiss the petition for leave to appeal alleging that it was acquitted and released from further proceedings because it had paid out the funds to Baker pursuant to the trial court's order; this court took that motion with the case and granted the petition for leave to appeal. General Steel then filed its brief setting forth 3 points, (A) that it was its duty once the order was entered in the trial court to transfer the fund to Baker without regard to potential unperfected appeal rights, (B) a garnishee who refuses or neglects to comply with such order of court may be attached and punished for contempt, and (C) that a garnishee's payment in reliance upon a court order coupled with the expiration of the statutory appeal period should discharge the garnishee from further liability out of the garnished fund.

In our opinion, Commonwealth Loan Co. v. Baker and General Steel Industries, Inc., 67 Ill. App. 2d 359, 214 N.E. 2d 904, we denied the motion to dismiss the petition for leave to appeal, reversed the judgment and remanded the cause for further proceedings consistent with our opinion. General Steel then filed its petition for rehearing on the grounds that in view of our opinion, the trial court's order was not binding on General Steel, that it was not an interested party in the proceedings but only a disinterested stakeholder, that an appeal had not been perfected, which we denied and filed our supplemental opinion on denial of rehearing. In that appeal General Steel took the position that it had at the time of service of summons upon it, property belonging to the judgment debtor in its possession, custody or control, although it had previously filed in the trial court an answer to an interrogatory stating that at that time it had no property belonging to the judgment debtor in its possession, custody or control. General Steel's position in that appeal was that it had property belonging to judgment debtor and had paid it to judgment debtor pursuant

to the direction of the order of the trial court. In that appeal, in its statement of facts it stated:

> "General Steel advised the Court and the Loan Company that Baker was no longer an employee but that General Steel held certain funds for the benefit of Baker, to-wit; proceeds in a pension fund."

Upon the cause being remanded to the Circuit Court, the plaintiff made a motion for judgment. The garnishee made a motion to strike the plaintiff's motion for judgment alleging, inter alia, that it had no opportunity to present its defense, and that it had a valid defense, to the claim of the plaintiff. On July 14, 1966, the court sustained plaintiff's motion for judgment, entered judgment for Commonwealth against General Steel, and denied the garnishee's motion to strike. On August 10, 1966, the garnishee General Steel filed its motion to vacate the judgment entered on July 14, alleging the same grounds as alleged in the motion to strike, and also alleged that its defense to the plaintiff's garnishment action was that the funds due and owing to Baker were the proceeds of a pension trust and that said pension trust was not subject to execution, garnishment or attachment, by the terms of the Trust Indenture, which was incorporated by reference into the motion. Contending that in the prior appeal it participated only for the purpose of defending its interests in the premises, and that it was there confined to the issues theretofore litigated, it was confined to the record as made between Commonwealth and Baker, and never had an opportunity to present its defense that the pension trust funds were not subject to garnishment by the terms of the trust indenture.

The Garnishment Act, Chap. 62, § 37, Ill. Rev. Stat., permits entry of a conditional judgment without a hearing. However, after entry of a conditional judgment the garnishee is entitled to notice thereof and the judgment creditor may cause a summons to issue to confirm the conditional judgment and further provides that the garnishee may appear and answer. Chap. 62, § 37 (a), Ill. Rev. Stat. If the garnishee responds to the attempt to confirm the conditional judgment a hearing should be held to determine whether the judgment should become final.

[1] We do not agree with plaintiff's contention that the garnishee should have

asserted its defense upon the earlier appeal, and know of no authority by which it has waived the defense which it now seeks to assert. In all these proceedings there has never been a time, when, under the Garnishment Act it was required to answer or present any defense. The order entered in the case before remandment was without notice to the garnishee, and although entered in error at a hearing in which it was not, and was not required to be, represented, was favorable to it. We have reversed that judgment and remanded the cause for further proceedings consistent with that opinion.

The assertion that the trial court was required to enter such an order by the directions in our earlier opinion is without merit. Our holding there was that the funds were not exempt from garnishment under the provision of the second exemption of Chap. 52, § 13, Ill. Rev. Stat. We did not direct waiver of any of the provisions of the Garnishment Act.

We have taken with this case plaintiff's motion to dismiss the appeal, due to the imperfections of the notice of appeal. Garnishee has urged that under the language of People, ex rel. Pickerell vs. New York Central R. R. Co., 391 Ill. 377, 63 N.E.2d 405, their notice of appeal is sufficient. There the holding was that a notice of appeal which referred to the judgment by date was in substantial compliance with the rule; as a result that case affords appellant little assistance. Here, however, the failure to comply with the rules neither misled the appellee, nor prejudiced its rights; likewise, it provided no delay nor confusion as to the issue in this cause. We therefore prefer to dispose of this cause on the merits.

As a result, we reverse the Judgment of the Circuit Court of Madison County and remand the cause with directions to enter conditional judgment on behalf of plaintiff against the garnishee, and further proceedings consistent with this opinion.

Judgment reversed, cause remanded with directions.

CONCUR: /S/ George J. Moran

CONCUR: /S/ Joseph H. Goldenhersh

PUBLISH IN ABSTRACT ONLY

87 I.A.2d 81 (2)

No. 66-85

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RAYMOND LANDOLT and ALICE LANDOLT, Plaintiffs-Appellees, vs. DONALD STRATMANN, d/b/a Stratmann Lumber Co., Defendant-Appellant.	Appeal from the Circuit Court of Madison County, Illinois. Before Honorable Austin Lewis.

EBERSPACHER, J.

The plaintiffs, Raymond and Alice Landolt, brought this action for damages which they claimed to have suffered as a result of the inadequate performance of the defendant, Donald Stratmann, d/b/a Stratmann Lumber Co., in the construction of a prefabricated house on land owned by the plaintiffs in Madison County. The defendant had undertaken by contract to erect a specific kind and model of prefabricated house for a stated price. The plaintiffs alleged that the house as constructed fell short of being the building which the defendant agreed to provide in twenty-nine (29) specified respects. It is also claimed that he had failed to perform in a workmanlike manner; that he abandoned his performance before completion and that the plaintiffs sustained damage resulting from the defendant's delay in finishing the job.

The defendant in addition to denying these, claimed that the house he produced conformed to his contract obligations; that alleged defects, if any, occurred after the plaintiff took exclusive possession of the building; that he, Stratmann, was denied the opportunity to inspect for, and correct any oversights or omissions which occurred during construction; and that he had substantially performed his undertaking as promised.

The defendant also counterclaimed for $3,515.00 as the balance due on the contract price, the final one of four installments. The defendant further sought relief against Gehrig's Gas Co., by filing a third party complaint, named that company as third party defendant. He had sub-contracted with that company to provide the plumbing and electrical work. He claimed in that complaint that any deficiencies existing in the plumbing and electrical systems were therefore the responsibility of Gehrig, and hence, that if he, Stratmann, were to be found liable to the plaintiffs for such defects, then Gehrig would in turn be liable to him for a like amount.

The case was tried in the Circuit Court of Bond County, Illinois without a jury. The court found the issues on the complaint for the plaintiffs, and awarded damages against the defendant Stratmann in the amount of $3,750.00. The court awarded the defendant Stratmann $3,515.00 on his counterclaim against the plaintiffs, thus awarding him the unpaid balance of the contract price. The court denied any claim for extras and found the issues for the third party defendant, Gehrig Gas Co., with respect to Stratmann's complaint against it. The defendant filed post trial motions which were denied and he brings this appeal.

While Defendant assigns a number of errors, his principal claim is that there is insufficient evidence to support the trial court's award of damages to the plaintiffs in the amount assessed, and that the award is against the manifest weight of the evidence. The defendant claims that the total damages proven are no more than $2,655.00 and hence the plaintiffs failed to meet their burden of proving the elements of their case by a preponderance of the evidence[1].

The guiding principle is that in reviewing a trial court's award of damages, a reviewing court will not interfere with the award where the evidence is conflicting or where there is evidence in support of the verdict and no indication that the award

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1. Raymond Landolt died at some time previous to the trial. The record does not show a substitution of parties. The judgment was entered for Paul Landolt (the surviving son of Raymond) and Alice Landolt.

was the result of passion, prejudice or corruption. I.L.P., Appeal and Error, Sec. 780. This principal must apply even in cases where the reviewing court would have been better satisfied with a different finding. Hulke v. Int'l. Mfg. Co., 14 Ill. App. 2d 5, 142 N.E. 2d 717.

[1] Ours is not the fact finding function. It is not our province to weigh and evaluate evidence. We may not concern ourselves with resolving conflicts in the evidence, its weight or with the credibility of witnesses. McManus v. Reist, 76 Ill. App. 2d 99, 221 N.E. 2d 418. These are all matters for the trier of the facts who heard the witnesses give their testimony in his court. It is the trial court, when sitting without a jury, who must determine where the truth lies. Guthrie v. VanHyfte, 36 Ill. 2d 252, 222 N.E. 2d 492. The presumption is that the trial judge heard sufficient evidence upon which to base his judgment, and the defendant when he appeals, has the burden of showing by the record, that the judgment is manifestly against the weight of the evidence. National Builders Bank of Chicago v. Simons, 304 Ill. App. 471, 26 N.E. 2d 665; Louis v. Checker Taxi Co., 318 Ill. App. 71, 47 N.E. 2d 351. From an examination of this record, we find that the evidence was conflicting concerning the nature and amount of damages.

Error cannot be predicated merely upon the fact that the sum of the figures in the testimony fail to equal the amount of the court's award which in this case was $3,750.00. There were many and varied elements of damage testified to by Mrs. Landolt and by the witnesses on behalf of the plaintiff, to which no specific monetary value was assigned in the evidence. The trial court was nevertheless justified in taking them into consideration. The p[illegible]

In Grand Trunk & Western R.R. v. H. W. Nelson Co., 116 F. 2d 823, the following statement is made at page 838, concerning damages for breach of a building contract:

> "Determination of damages for breach of a contract is an inexact science and the sum reached by whatever method used will never be more than an approximation. This impossibility of precise determination is generally recognized and the law does not require mathematical certainty. Recognizing the evidential difficulties inherent in fixing damages to

inflexable monetary terms, the law adjusts itself to the exigencies of the business world."

Therefore, the trial judge's award in this case cannot be measured for propriety by the addition process alone. If the presumption in favor of the trial court's findings is to be given any effect, we must presume that its award is based upon the several aspects of damage for which the evidence provides a basis, and the law allows recovery. In this case these elements go beyond the estimated price of practical repair of the house, or the estimated cost of attempts to make it into an approximation of the house promised by the contract and for which the defendant is being paid in full by the court's award.

The defendant's own testimony provides evidence of defects and of incomplete or faulty performance. He testified that the patio slab in the rear of the home is cracked; that the wooden forms were never taken away from the concrete foundation; that the joints in the guttering were never sealed; that defective tiling is present; that the septic system is not connected to the house through an oversight and that it is located contrary to agreement, to name part of them. The defendant, in his testimony, claims that the cracked patio can be disregarded since it was not called for in the specifications. This does not excuse the defendant from the consequences of defective work once he has undertaken to provide the item. "Accompanying every contract is a common law duty to perform with care, skill, reasonable expediency and faithfulness, the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract." Am. Jur., Negligence § 20.

There is testimony in the record that the Landolts sustained some loss of salable land due to the septic system having been installed on land other than that selected, or so the trial court could have found. If the trial judge did so find, he was entitled to compensate them for this, or the loss of use of the land, if any. The rental value of property during the time its use was denied to the plaintiff is a proper element of damages if caused by defendant's breach of contract. The court could have properly considered this element in arriving at the amount of this award.

There is no reason why on the evidence in this record, the judge who heard the case could not have used any of these elements in computing the damages. He could have considered the cost of curing some defects, while considering diminition of value in regard to others. The trial judge is not required to confine himself to one of the theories in computing the plaintiffs' damages. Fairness may require that both standards be applied in this case. There is evidence of defects which are numerous and varied in character and importance. They differ in what can or should be done about them.

The following statement from Corbin on Contracts is applicable:

> "Where there are alternative methods for the measuring of damages recoverable for breach . . . . . (cost of curing the defects or diminition of value) the choice may properly be made to depend upon the character and quality of the conduct of the party guilty of the breach. In any case the doubts are generally to be resolved against him; . . ." Vol. 5, Corbin on Contracts, p. 498, Sec. 1090.

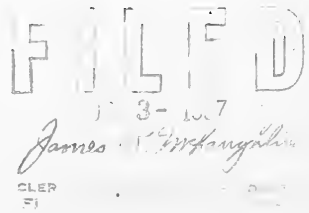
The defendant contends that it was error to allow a contractor to testify as an expert for the plaintiff, as to the existence and the probable cost of curing defects in the house and to give opinion evidence. Whether or not this witness was an expert and should have been allowed to testify as one is a question upon which this Court is not free to substitute its judgment for that of the trial court. This is a matter within its discretion.

The exercise of this discretion by the trial court in determining whether or not a witness was qualified to give opinion evidence as an expert will not be reviewed or reversed by a reviewing court, except in cases in which there was no evidence that the witness possessed the qualifications of an expert or in cases in which the trial court has applied the wrong legal standards. See annotation 166 A.L.R. 1067. Here, the uncontradicted evidence in the record is that the contractor witness had been engaged in the building of houses continuously for over 10 years in and around the neighboring Belleville and St. Clair County area. Thus, the trial court was within the discretion that the law gives him, and it was for him to determine whether or not the witness could give opinion evidence and for him to determine the weight to be given those opinions.

The defendant contends the trial court erroneously considered a detailed list of specifications prepared by the defendant's salesman in August 1961 to be a part of the contract. The testimony in connection with this was that these specifications were prepared and the kind of house the plaintiff wanted was agreed upon at that time. The plaintiff paid $500.00 at the time that document was prepared. Mrs. Landolt testified that they had done this so that construction could be started immediately if they finished preparing the building site when there was still some good building weather left. If the defendant saw fit to accept the sum of $500.00 he must have considered himself under a promise to commence construction when the plaintiffs were ready. This document is quite detailed in describing the house and the materials involved. It was a form commonly used by the defendant in the sale of prefabricated houses, and was identified by having the name, "Mr. & Mrs. Ray Landholt" written on it. There was testimony that when the contract was signed in June 1962, it was agreed that the earlier specifications were a part of it. The record further seems to indicate that the defendant was under the same duty and liable for the same defects under either the first specifications or the subsequent signed document. Therefore, the defendant was not prejudiced if the first set of specifications was in fact found to be part of the contract. The defendant points to language in the second signed contract, stating that it contains the entire agreement between the parties; such language does not excuse a builder from the entirely reasonable obligation to perform in a workmanlike manner so that his product shall be fit and proper for its intended use.

Having disposed of this cause on the merits, all pending motions taken with the case, are denied. Finding no reversible error, the judgment of the Circuit Court is affirmed.

Judgment affirmed.



CONCUR: /S/ George J. Moran

CONCUR: /S/ Joseph H. Goldenhersh

PUBLISH IN ABSTRACT ONLY.

87 I.A.2 121

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10840 Agenda No. 67-28

People of the State of Illinois,

Plaintiff-Appellee

vs.

Melvin Sanders and William Gene Walker,

Defendants

# # #

William Gene Walker,

Defendant-Appellant

Appeal from Circuit Court Macon County

TRAPP, J.

The defendant and one Melvin Sanders were found guilty by a jury's verdict upon a charge of robbery and sentence was imposed with a minimum of three years and a maximum of twenty years. In this appeal Walker urges that the verdict was contrary to the manifest weight of the evidence, and that he was not proven guilty beyond a reasonable doubt.

The evidence discloses that Lewis, aged 21, and his friend Hunter, aged 17, met Walker and Sanders at a pool hall in Decatur at about 10:00 P.M. on February 26, 1966. One Fecht, called as a witness by the defendant, was already there. Games of pool were played by the several parties, but the

record is not clear as to who played whom, and whether money was wagered. It is agreed in the record that while at the pool hall there was a discussion of going to the home of Sanders to play cards, and they repaired to the bus depot for coffee for a period of fifteen minutes to one-half hour. All left together and Hunter and Lewis sought to borrow an automobile from a friend to go to Sanders' home. They were unsuccessful, and rejoined Walker, Sanders and Fecht.

After walking a short distance Hunter and Lewis determined not to go to play cards, and separated from the defendants after telling them that it was too far to walk to Sanders' home. The evidence for the prosecution is that Walker and Sanders caught up with Hunter and Lewis; that Sanders tripped Lewis while Hunter ran and Sanders chased him; then Lewis was struck and knocked down by Walker who held him until Sanders returned, and then Sanders compelled Lewis to produce his wallet from which Sanders took four dollars. The evidence is that after being warned not to call the police, Lewis proceeded to his home to clean up and then went to his sister's home to call the police. Hunter met Lewis at the sister's home, or as he was approaching it. He stated that he had been trying to call for police assistance.

It is urged that there is such contradiction within the evidence offered by the prosecution as to fail to prove guilt beyond a reasonable doubt in that (1) Hunter and Lewis do not agree about the number of games of pool that were played, (2) that there is contradiction as to the way the men walked down

the street, (3) that the evidence as to the conditions of light at the scene of the crime is contradictory, and (4) that there is contradiction between Hunter and Lewis as to whether, following the event, they met at the home of Lewis' sister as testified to by Lewis, or while two or three blocks away from such home as testified to by Hunter.

We note that all witnesses agree that the parties met at the pool hall, that there was some playing of pool games, that all went out together for coffee, and went together to see about borrowing a car. Walker admits beating or striking Lewis, and Sanders testified that Walker did so beat or strike Lewis. They say this occurred because Lewis became angry at losing at pool and called Walker an obscene name. It is defendant's theory that Lewis and Hunter contrived the robbery charge as revenge. This position is not consistent with their own testimony as to their companionable joining in coffee and seeking to borrow an automobile. The defendant Walker was impeached by the introduction of an appropriate record for his conviction for felony.

Defendant's witness, Fecht, is considered unreliable by the defense, and he was impeached by appropriate record of conviction, and by a statement to a representative of the State's Attorney's office that he heard Walker and Sanders discussing taking money from Hunter and Lewis. This he denied at the trial.

The asserted discrepancies in the prosecution's testi-

mony upon the points of the lighting condition, or whether Hunter and Lewis met at the home of Lewis' sister, are essentially upon collateral issues. Hunter testified that he could see the activity, although not necessarily identify individuals. Again, the testimony concerning whether Hunter and Lewis met at the home of the latter's sister, or while two or three blocks away, may be essentially a difference in mode of expression. These contradictions were argued before the jury.

Defendant urges that it is the duty of the reviewing court to examine the evidence and to reverse where the evidence is so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt. He cites The People v. Coulson, 13 Ill.2d 290; 149 N. E.2d 96. There the prosecuting witness claimed to have been robbed, and testified that the defendant drove him to his home and waited in the car while the prosecuting witness went inside to get more money. The Supreme Court considered such testimony improbable, if not incredible. In The People v. Jefferson, 24 Ill.2d 398; 182 N. E.2d 1, and The People v. Bartley, 25 Ill.2d 175; 182 N. E.2d 726, the court reviewed evidence where the victim, or the eye witness, could not identify the defendant, and in each instance the defendant had an alibi of some substance.

Such factors are not present in this case, and the problem is one essentially of the evaluation of the credibility of the witnesses. This, of course, is the function of the jury. The fact that there is a conflict between the evidence presented in behalf of the prosecution and the evidence presented in

behalf of the defendant does not involve the issue of improbable or unsatisfactory evidence found by the Supreme Court in the cited cases.

The judgment of the trial court is affirmed.

Affirmed.

CRAVEN, P. J. and SMITH, J. concur.

87 I.A.2 122

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10887 Agenda No. 67-53

People of the State of Illinois,
Plaintiff-Appellee
vs.
Melvin Sanders,
Defendant-Appellant

Appeal from
Circuit Court
Macon County

TRAPP, J.

The defendant and one William Gene Walker were tried before a jury and found guilty of robbery. Defendant appeals this conviction.

Upon this appeal it is contended that the verdict of the jury was contrary to the manifest weight of the evidence, and that he was not proven guilty beyond a reasonable doubt. This same issue upon identical facts was considered in the appeal of the defendant, William Gene Walker, our Number 10840, decided concurrently with this case. Ill. App.2d ; N. E.2d . Our conclusion that the evidence in that case was sufficient to convict determines this issue.

The defendant also contends that, as to this particular case, the public defender appointed to represent the defendant was incompetent, and that substantial prejudice resulted from

such incompetency.

It is urged that defendant's counsel failed to cross-examine as to the existence or absence of fingerprints upon the wallet of the prosecuting witness. It is noted that there was no evidence in chief upon the issue of fingerprints and no proper basis or foundation for the suggested cross-examination.

It is urged that counsel failed to argue to the jury the fact that there was no evidence of fingerprints upon the wallet, and no evidence of bloodstains upon the wallet. The record discloses that counsel did, in fact, argue to the jury that there was only the testimony of the prosecuting witness, Lewis, that money was taken from him, and that there was no physical evidence which corroborated such testimony. Thus, the issue was presented to the jury, even though the present counsel might have seen fit to make his argument in other language.

Defendant argues that it was the theory of the defendants that the prosecuting witness was angry because of losing money at pool games and that, in anger, he called Walker an obscene name and the latter struck, or beat, him because of such provocation. It is argued that counsel was incompetent in failing to cross-examine the prosecuting witness upon the question as to whether or not he had called Walker an obscene name. The record shows, on the contrary, that in the cross-examination of the prosecuting witness he asked, both at the time of the acts constituting the robbery and at a time when

the parties were a short distance away, as to whether there was any trouble, quarreling or cursing, and the witness had stated that there was none.

 It is urged that there was a failure to cross-examine as to various times when the several parties were at the pool hall and at the bus depot drinking coffee. We have found no conflict in the evidence as to these times and places, and such cross-examination would have been upon collateral issues.

It is contended that there was prejudice in failing to comment upon the absence of testimony by any police officer concerning the crime. Such officers, of course, were not present at the scene and learned of the matter sometime later. Since the striking and beating of the prosecuting witness is admitted, corroboration as to the appearance of the prosecuting witness is meaningless.

 Defendant relies upon certain authorities wherein it has been held that the representation of the defendant was so inadequate as to require a reversal. The particular case relied upon is The People v. Morris, 3 Ill.2d 437; 121 N. E.2d 810. In that case the record disclosed that there had been a failure to apply for the discharge of the defendant for the reason that he had not been tried within four months of his arrest, and further evidence that counsel had failed to consult with the defendant as to his defense, except very briefly. The court there held, in a post-conviction hearing, that the representation was so inadequate as to amount to depriving defendant of constitutional due process. The rule announced by

the court in that case is that it must be shown from the record that there is actual incompetency in the representation, and substantial prejudice to the defendant without which the outcome of the trial would have been different. In The People v. Coolidge, 26 Ill.2d 533; 187 N. E.2d 694 and in People v. Gray, 57 Ill. App.2d 221; 206 N. E.2d 821, cited by defendant, the courts found that there had been no incompetence of counsel shown by the record.

The record in this case does not sustain the contention that the public defender was incompetent, either in the preparation or in the handling of the matters at trial, and the judgment of the trial court is affirmed.

CRAVEN, P. J. and SMITH, J. concur.

87 I.A.2 138

NO. 67-63

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JEAN MAYBERRY, Plaintiff-Appellant, vs. FRANK MOSER AND FRANK MOSER As Executor of the Estate of Caroline S. Moser, Defendant-Appellee.	)	Appeal from the Circuit Court of Hamilton County, Illinois. Honorable John D. Daily, Judge Presiding.

Goldenhersh, J.

Plaintiff appeals from the judgment of the Circuit Court of Hamilton County entered in favor of the defendant after a jury trial.

Plaintiff, the daughter, and one of the two surviving children of Caroline S. Moser, deceased, filed an action to contest her will. In her complaint, filed in one count, she alleged that the will was fraudulent, that by reason of physical and mental incapacity the testatrix was not competent to make a will, and the purported will was executed as the result of the undue influence exerted over the deceased by the defendant, Frank Moser, the other surviving child of Caroline S. Moser, and executor of her last will and testament.

Defendant answered and the case came on for trial. At the close of the plaintiff's case the trial court directed a verdict in favor of defendant on the issue of fraud, and at the close of all the evidence directed a verdict in favor of defendant on the issue of undue influence. The remaining issue of whether the testatrix was competent to make the will was submitted to the jury who returned a verdict in favor of defendant.

Plaintiff contends that the trial court erred in directing verdicts on the two issues, and erred in refusing to give an instruction tendered by plaintiff with respect to the issue of the testatrix's competence.

Neither the Excerpts from the Record, nor the Record on Appeal, contains a post-trial motion.

Section 68.1(2) of the Civil Practice Act (Ch. 110, sec. 68.1(2)) provides in part: "Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment non obstante veredicto, for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion.", and "A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion."

Section 68.1(5) of the Civil Practice Act provides: "Any party who fails to seek a new trial in his post-trial motion, either conditionally or unconditionally, as herein provided, waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict."

There is no question that insofar as this appeal involves claims of error relevant to the issue which was determined by the jury verdict, the failure to file a post-trial motion precludes review by this court. Neiman v. City of Chicago, 37 Ill. App. 2d 309. Whether we may review the trial court's direction of the verdicts on the other issues presents a different problem.

Until recently there was a conflict in the decisions of divisions of the Appellate Court as to the necessity for a post-trial motion in cases in which the trial court directed a verdict,

but this difference of opinion has now been resolved by the Supreme Court in Keen v. Davis (Docket No. 40385, Agenda 24, May 1967). In our opinion, however, the holding in Keen v. Davis applies only in those cases in which no issue is submitted to the jury and a verdict reached. Where a verdict is returned even though some issue or issues have been determined by direction of a verdict, a post-trial motion filed in compliance with Section 68(1) is necessary. Absent such motion, there is nothing which this court may review and the judgment of the Circuit Court of Hamilton County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

87 I.A.2 139

No. 67-33 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

RICHARD J. MARTIKONIS and BELVA STAAS,	)	
Plaintiffs-Appellants,	)	
v.	)	Appeal from Circuit Court Winnebago County
CITY OF ROCKFORD, a municipal corporation, and H. S. MERZ, Superintendent of Water Department, City of Rockford, Illinois,	)	
Defendants-Appellees.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

On February 24, 1966, the plaintiff-appellants, as residents and taxpayers of the City of Rockford, filed their Complaint for Injunction against the City and the Superintendent of the City's Water Department. The complaint alleged that the City had, on December 20, 1965, amended its Code of Ordinances to direct the Superintendent of the Water Department to add to the water "approved and appropriate amounts of fluorine for the prevention of tooth decay;". The complaint further charged that the ordinance, as thus amended, was unconstitutional since it did not establish adequate standards to guide the Superintendent and was therefore an improper delegation of legislative powers to an administrative body. It further complained that the Superintendent was in fact adding hydrofluosilicic acid, not fluorine, to the water, in violation of the ordinance and asked the court to enjoin and restrain the City "from in anyway attempting to carry out the provisions of said ordinance ..." and to declare the ordinance void.

The counsel for the plaintiffs, after due notice to the City, appeared before the court on March 4, 1966, for a hearing on his motion for a temporary injunction, without bond, against the City in accordance with the prayer of the complaint. The City had previously notified the plaintiffs at 4:00 P. M. on March 3 that they would file their motion to dismiss the complaint on March 4. Over the strenuous objections of the counsel for the plaintiffs, the court heard arguments on both motions on that day and then dismissed the complaint with leave to the plaintiffs to file an amended complaint within 10 days.

On March 12, 1966, the plaintiffs filed their amended complaint, substantially similar to the original, with an additional allegation that the ordinance was contrary to law since it was not published as required by statute. The City duly answered the amended complaint with a general denial and no further action was taken until August 18, 1966, when a second amended complaint was filed that contained an additional allegation that the ordinance was defective because it was contrary to a "committee report". The City also answered that complaint with a general denial and, on January 4, 1967, moved for judgment on the pleadings. The court thereupon entered its order that the second amended complaint "does not show a cause of action for injunctive relief and is without equity" and dismissed the cause with prejudice. This appeal is prosecuted from that order.

The plaintiffs recognize that the City could, in the exercise of its police power to protect the public health, fluoridate its water supply in accordance with reasonable and accepted standards. Schuringa v. City of Chicago, 30 Ill. 2d 504, 516. It is contended, however, that the ordinance in this case was improperly drafted and, as it now stands, is unconstitutional, null and void.

On July 18, 1967, "An act to provide for safeguarding the public health by vesting certain measures of control and supervision in the Department of Public Health over public water supplies in the State" approved August 6, 1951 (Ill. Rev. Stat., Ch. 111 1/2, Sec. 121, 1965) was amended by the addition of a Section 7a. That section provides as follows:

> "In order to protect the dental health of all citizens, especially children, the Department shall promulgate rules in accordance with "An Act concerning administrative rules", approved June 14, 1951, as heretofore or hereafter amended, to provide for the addition of fluoride to public water supplies by the owners or official custodians thereof. Such rules shall provide for the addition of the fluoride to the water supplies so as to maintain a fluoride content of not less than 0.9 milligram per liter nor more than 1.2 milligrams per liter."

A court of review will ordinarily not consider a constitutional question as a mere abstract proposition of law. Consequently, if the position of the party who challenges the statute would not be materially affected by a determination of the constitutional issue, the court may properly decline to consider that issue. Similarly, a constitutional question will not be entertained if the issue has been rendered moot by subsequent legislation. Maywood Trotting Ass'n. v. Racing Com., 15 Ill. 2d 559, 563; Lindburg v. Zoning Board of Appeals, 8 Ill. 2d 254, 255.

It is obvious that the position of the plaintiffs will be unchanged regardless of the validity of the ordinance that they challenge. The recent legislation by the State of Illinois makes the fluoridation of all public water supplies in conformity with the expressed standards compulsory.

In any event, we question the standing in equity of the plaintiffs, as taxpayers and property owners, to enjoin the City in its execution of an allegedly unconstitutional ordinance without an allegation of special injury. Droste v. Kerner, 34 Ill. 2d 495, 504.

We conclude that this case is now moot, but since we do not wish to be understood as either validating or invalidating the present ordinance here under question, we therefore reverse and remand this cause with directions to the trial court to dismiss the last amended complaint on the ground of being moot. Maywood Trotting Ass'n. v. Racing Com., supra, pages 563 and 564.

REVERSED AND REMANDED
WITH DIRECTIONS.

DAVIS, P. J. and MORAN, J. CONCUR.

87 I.A.2 180

Filed 4-20-67

NO. 67-29M

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

OTTO W. HOMANN, d/b/a SCHMIDT-HOMANN REAL ESTATE,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of Madison County, Illinois. Honorable Harold O. Gwillim, Magistrate Presiding.
vs.	)	
FRANK R. WILSON and LUCILE G. WILSON,	)	
Defendants-Appellees.	)	

Goldenhersh, J

Plaintiff appeals from the judgment of the Circuit Court of Madison County entered after a non-jury trial in plaintiff's suit to recover a commission for the sale of a house owned by defendants. Defendants have not appeared or filed a brief in this court, and although we may, where the appellee files no brief reverse the judgment without further consideration of the case, we may also, at our discretion, review the cause on its merits. Our election to pursue the latter course is not to be construed as any indication that in another case we shall again do so.

On May 12, 1965, plaintiff and defendants signed a written agreement headed "Exclusive Listing" which contained the following provisions:

> "You have the exclusive right to sell my property at Troy, Illinois for 3 months at the regular commission rates of 5% for (price) $34,500 (or at a greater or lower price if I accept).* * * * * and in consideration thereof you shall be entitled to the commission if the property is sold within the said period, by whomsoever sold, and after the termination of this exclusive right to sell if sold to a purchaser originally procured by you."

Within the 3 month period plaintiff brought a couple named

Smith to defendants' home to view the property. On August 20, 1965 defendant, Lucile Wilson, wrote plaintiff as follows:

> "Thank you for sending the enclosed papers but we could not possibly lower the price to $30,000.00.
>
> Consequently we have now given the house to Wille of Collinsville and will have to hope for a buyer at our price. You may not know that Mr. Smith came back to see us and offered us $28,000.00 but we could not even consider this.
>
> It was a pleasure doing business with you and who knows maybe one of your clients will pan out."

Sometime in November defendants agreed to sell the property to the Smiths for $30,500.00, and title was conveyed by deed dated November 19, 1965.

The testimony shows that upon expiration of the contract with plaintiff, defendants had entered into a contract with another broker (Wille). Defendant, Frank R. Wilson, testified that during the period in which the contract with the second broker was in force, the Smiths contacted defendants and made an offer for the property. Although the contract with Wille is not in evidence, defendant, Frank R. Wilson, testified that it expired on November 13, 1965.

The secretary-treasurer of a savings and loan association testified that on November 10, 1965, his association accepted from the Smiths an application for a loan. The application sought funds with which to purchase defendants' property and stated that the purchase price was $30,500.00. The association made a loan to the Smiths, and at the time of trial held a mortgage on the property.

In its judgment order, the trial court found:

(1) That the plaintiff (the broker) had abandoned

the prospective purchaser (51 Ill. App. 243);
(2) That it was unreasonable to bind seller under an exclusive agency contract for almost three months after it expired (50 Ill. App. 173).

Because the facts are not in dispute, their legal effect becomes a matter of law, and the rule that the findings of the trial court should not be disturbed unless manifestly against the weight of the evidence does not apply. Puttkammer v. Industrial Commission, 371 Ill. 497; Fransen Const. Co. v. Industrial Commission, 384 Ill. 616.

To constitute abandonment, discontinuance of negotiations for a short time is not sufficient; the evidence must also show abandonment by the purchaser of all intention of buying the property. Rasar & Johnson v. Spurling, 176 Ill. App. 349. Here the evidence showed that the Smiths, admittedly procured by plaintiff, continued an active interest in, and ultimately purchased the property. In Watts v. Howard & Calkins, 51 Ill. App. 243, cited by the trial court, the prospective buyer had abandoned any effort to purchase, and the renewal of interest was brought about by an act of the seller, independent of any act of the agent. We find the case to be clearly distinguishable.

In finding that three months was an unreasonable length of time for which to bind defendants to the contract, the trial court cited Biddison v. Johnson, 50 Ill. App. 173. Biddison held that a broker's delay in informing his client that a loan to the client had been procured was an unreasonable neglect of duty, and barred the broker's recovery of his commission. It also declared that the question of reasonable or unreasonable neglect of duty depended on the facts of each case. The evidence shows that plaintiff procured the buyers

during the life of the contract, and that the buyers were in contact with the defendants on at least two occasions thereafter, resulting in the sale of the property approximately three months after the contract had expired. The Restatement of the Law of Agency, 2d Edition, Section 446(c) states:

> "Where no time specified. Unless it is otherwise manifested, if there is no time limit stated, it is inferred that the offer to pay commissions expires after the lapse of a reasonable time, which, in the ordinary real estate transaction, may be a considerable period."

Where no time is specified, a broker is allowed a reasonable length of time to perform. Day v. Porter, 60 Ill. App. 386 (Affirmed 161 Ill. 235). Upon the facts here presented, we hold that a period of three months between the expiration of the listing contract and the sale of the property is not an unreasonable time for plaintiff's procurement to ripen and thus entitle him to the agreed commission.

For the reasons set forth, the judgment of the Circuit Court of Madison County is reversed and the cause remanded with directions to enter judgment in favor of the plaintiff, and against the defendants for the sum of $1525.00 and costs.

Judgment reversed and cause remanded with directions.

Concur: Edward C. Eberspacher

Concur: George J. Moran

PUBLISH ABSTRACT ONLY

No. 66-72

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

LORETTA FRANKE, Plaintiff-Appellee, vs. WILLIAM FRANKE, Defendant-Appellant.	)	Appeal from the Circuit Court of Will County, Illinois.

CORYN, J.

This is an interlocutory appeal by defendant-husband from a decree for temporary alimony entered June 29, 1966, awarding to plaintiff-wife the sum of $100 per week retroactive to July 16, 1965, in a proceeding for separate maintenance commenced April 21, 1964. The verified complaint alleged that on April 20, 1964, plaintiff was compelled to leave defendant and was living separate and apart from him. The proof at the hearing for temporary allowances showed, however, without contradiction, that plaintiff and defendant were living together in the marital home at the time the complaint herein was filed, and that at that time, on plaintiff's application without notice or bond, a writ of injunction issued against defendant ejecting him and enjoining him from coming to the premises, and that obedience to this writ effected the separation. Before the conclusion of the preliminary hearing on May 20, 1966,

by leave of court, defendant filed an answer with counterclaim for divorce alleging the foregoing to constitute desertion.

Defendant contends that inasmuch as the fact of separation is an essential element of plaintiff's cause, to be alleged and proved as having occurred prior to the filing of the complaint, the proof here fails to establish plaintiff's right to temporary alimony. It is alleged that because of this failure of proof the trial court lacked jurisdiction to enter the order for plaintiff. It is argued, alternatively, that if the trial court did have jurisdiction, it nonetheless abused its discretion because the evidence fails to show the plaintiff's need for support assistance from defendant, or defendant's ability to pay it, but shows, rather, that plaintiff's earnings and assets are greater than defendants.

The subject matter jurisdiction of the trial court to entertain an application for temporary alimony derives from Ill. Rev. Stat., ch. 68, § 22, and ch. 40, § 16. It is apparent here that the trial court had jurisdiction of the persons of the parties to these proceedings since both appeared seeking relief. We think the question presented is merely one of whether that jurisdiction was exercised properly under the pleadings and evidence, and not whether the trial court had jurisdiction of the subject matter and the parties hereto. While the fact of a separation without fault on the part of a plaintiff is an essential element of a cause for separate maintenance which must be alleged and proved in support of a decree for that relief, we do not think that this allegation needs to be proved by a preponderance in support of a decree for temporary allowances. Even if it should have appeared to the trial court at the time of the hearing that defendant can probably sustain the charges of his counterclaim for divorce, it was still properly within the dis-

cretion of that court to make an award for temporary alimony. Ill. Rev. Stat., ch. 40, § 16. In Baumgartner v. Baumgartner, 16 Ill. App. 2d 286, cited by defendant, the complaint for separate maintenance failed to allege a separation at all, and the proof on final hearing showed that in fact the parties were living together when the complaint was filed, and that the separation was effected by a writ of injunction issued pursuant to its prayer. The Appellate Court there held that proof of a separation effected by a writ of injunction issued after suit was commenced does not establish a separation without fault on the part of the plaintiff, that the injunction has no legal consequence in this respect, and that the failure of the complainant there to allege such a separation without fault, or to prove it, indicated that the proceeding was not commenced in good faith. In that circumstance, an award of attorney fees to prosecute such a patently insufficient cause was held erroneous. Other cases cited by defendant are of similar effect and do not involve temporary allowances. Moreover, the cause here is not patently insufficient, for the allegations of the complaint, if shown to be true at the time of the final hearing, will support a decree for the relief sought. It was not necessary for plaintiff to prove those allegations on her application for temporary relief, and the mere fact that the proof at this point in support of defendant's counterclaim for divorce may suggest the allegations of the complaint to be untrue, and those of the counterclaim to be true, does not preclude the trial court from exercising its discretion to grant or withhold temporary relief pendente lite.

The matter of fixing the amount of temporary alimony is difficult, even though the rules are clear, because proceedings of this character provoke animosities, which if not justifiable, are at least sometimes understandable, although they cast a mist over the facts. The record demonstrates that defendant

was uncooperative, frequently refused to answer questions put to him by plaintiff's counsel, was evasive with answers to questions put to him by the court, and frequently asserted that he does not wish to support his wife. Thus, even though the trial court may have wished not to penalize him for allowing feelings to overcome judgment, it was nevertheless charged with the responsibility of fixing a fair award on the basis of the best evidence available to it, and we cannot alter that determination unless the record demonstrates a clear abuse of discretion. We have considered the evidence here, and that the court's determination as to defendant's ability to pay was largely a matter of inference from evidence as to the customary standards of living adopted by the parties while living together and since their separation, and from evidence of their joint and separate assets, liabilities, borrowing power and from defendant's business records and plaintiff's income from investments and teacher's salary.

We think the record demonstrates the defendant's ability to support his wife. The conclusion as to plaintiff's needs, however, fails to take into account the rental value of the premises occupied by plaintiff so that an allowance of a comparable amount for housing facilities could be set off for defendant. Considering the evidence as to the value of the house, which is wholly paid for, and after making an ajustment for taxes and insurance, we think a conservative housing allowance credit for these premises would be $140.00 per month. After making this adjustment to the sums allowed plaintiff by the trial court, which is in other respects found fair, we think a proper award to plaintiff would be $65.00 per week. We also conclude that the trial court should not have made the award retroactive to July 16, 1965, since the record indicates that the frequent delays in prosecuting this cause were attributable to plaintiff. Accordingly, the judgment of the Circuit Court is affirmed

insofar as it awards plaintiff temporary alimony, but said award is modified from $100 per week to $65 per week commencing June 29, 1966. Said decree is, however, reversed insofar as it purports to be retroactive to July 16, 1965. It is further ordered that the cause be remanded for further proceedings consistent herewith.

Affirmed in part, reversed in part.

Stouder, P. J. and Alloy, J. concur.

87 I.A.2d 218

NO. 66-121

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MELVIN A. HILDEBRAND, Plaintiff-Appellee, vs. CATHERINE E. HILDEBRAND, Defendant-Appellant.	)	Appeal from the Circuit Court of Madison County. Honorable James O. Monroe, Jr., Judge Presiding.

Goldenhersh, J.

Defendant appeals from the decree of the Circuit Court of Madison County granting plaintiff a divorce on the grounds of desertion.

Defendant contends that the trial court erred in denying her petition for a change of venue. A proper discussion of this issue requires a review of the proceedings which preceded the filing of defendant's petition.

In his complaint, filed June 30, 1965, plaintiff alleges the marriage of the parties, the birth of one child then 4 years of age, defendant's desertion, that custody of the child should be awarded to defendant subject to his visitation rights and his having temporary custody for a period of 4 weeks each year while on vacation from his employment.

Defendant answered, denying the desertion, alleging that plaintiff should be awarded neither temporary custody nor visitation rights for the reason that such custody and visitation would adversely affect the stability of the child.

Defendant also filed a counterclaim charging plaintiff with desertion, and praying for custody of the child and other relief. Plaintiff replied, denying the allegations of the counterclaim.

On April 20, 1966, the case came on for hearing. The record does not show whether this was on a regular setting of cases, on notice, or by agreement of the parties. Defendant offered the testimony of defendant and one other witness to the effect that plaintiff voluntarily left the home, he had started fights with her and other members of her family, had associated with other women, and had a bad temper. Upon conclusion of the hearing the court entered the following order:

> "April 20, 1966. Case called on the merits regarding the claim and the counterclaim, but subject to presentation of further evidence regarding all matters concerned. Witnesses sworn, evidence heard. Cause on the merits taken under advisement. Custody of the minor child, Mary Elizabeth Hildebrand, awarded temporarily to the defendant-counterplaintiff, Catherine E. Hildebrand, with visitation awarded to the plaintiff-counterdefendant, Melvin A. Hildebrand, from 2:00 o'clock p.m. until 8:00 o'clock p.m. Sunday of each week until further order, outside the defendant-counterplaintiff's residence, but subject to such places as are consistent with the welfare of the child. Plaintiff-counterdefendant ordered to pay $50.00 a month for child support until further order of this court. All other questions reserved. Support payments ordered paid the 24th of April, 1966, and the 24th of each month thereafter, until further order. Visitation to commence the 24th of April, 1966, and each Sunday thereafter, until further order of the court.
>
> Case continued to July 11, 1966, without further notice."

On May 12, 1966, defendant filed a motion alleging that the order of April 20, 1966, had caused a harmful emotional reaction on the part of the child, and praying that the order be vacated, or in the alternative, it be amended to permit visistation only at defendant's home, and in her presence.

On May 16, 1966, the court entered an order setting defendant's motion for hearing on June 3, 1966.

On June 2, 1966, plaintiff filed a petition praying that a citation issue directed against defendant "to show cause why she

should not be found in contempt for the violation of this Court's order of April 20, 1966".

On June 3, 1966, the court entered the following order:

"June 3, 1966. Motion to vacate or in the alternative to amend temporary order of April 20, 1966 pursuant to notice of setting mailed May 16, 1966. Roy Strawn of the movant firm, Chapman and Strawn, appears but states he does not want to be heard on this matter. The motion raising matters outside the record being unsupported by affidavit or witnesses, is denied.

Petition for citation presented. Citation ordered issued returnable at 2:00 o'clock p.m. Friday, June 10, 1966."

On June 8, 1966, defendant filed a motion to vacate the order of April 20, 1966, setting forth correspondence between the court and defendant's counsel with respect to counsel's being engaged in trial on June 3, 1966, and alleging that the trial court's action in entering the order of June 3, 1966, was arbitrary and deprived defendant of an opportunity to be heard on her motion to vacate.

On June 9, 1966, defendant filed a petition for change of venue alleging that the trial court was prejudiced against her so that she cannot expect a fair trial, and the prejudice first came to her knowledge on June 7, 1966.

The record shows a hearing on June 9, 1966. There was a great deal of colloquy between court and counsel, defendant offered the deposition of a psychiatrist who had examined the child, and on June 10, 1966, the court entered the following order:

"Now on this day, June 10, 1966, Motion for change of venue presented and denied, not being timely. Motion to vacate order of June 3, denying post-trial motion presented, apparently on grounds defendant was not represented at June 3 hearing of the post-trial motion. Mr. Roy Strqwn (sic) defendant's counsel in the original procedures to which the post-trial motion was directed having been present at the post-trial motion hearing of June 3, the motion to vacate is denied.

Citation summons and petition presented. Motion to

strike denied. Answer on file. Witnesses sworn, evidence heard. The court finds defendant wilfully refused to comply with the April 20 visitation order of the court, and finds her in contempt of the court. Punishment for contempt reserved and deferred."

On June 16, 1966, the court entered the following order:

"In view of the questions concerning custody and visitation, the case is called for pretrial conference, in Courtroom 2, Edwardsville, Illinois, at 9:00 a.m., Wednesday, June 22, 1966, at which conference the parties are ordered to appear in person as well as with counsel, and Catherine E. Hildebrand is ordered to produce with her the child, Mary Elizabeth Hildebrand, for observation or examination of or colloquy with the child and/or the parties, as may be appropriate in the best interest of the child and of justice in this case."

On June 22, 1966, the following order was entered:

"Now on this day, June 22, 1966, Pre-trial conference held. The child, Mary Elizabeth Hildebrand, examined by the curt (sic) in open court in the presence of the parties and defendant's counsel, Plaintiff's counsel having waived appearance, but plaintiff being present in person. Also present a probation officer."

On June 27, 1966, the court entered the following order:

"Now on this day, June 27, 1966, Hearing resumed on the merits. Witnesses sworn, evidence heard. Recess to July 5, 1966."

The transcript shows that on June 27, 1966, defendant moved to dismiss her counterclaim, and the motion was allowed. Testimony was taken over a period of several days, the decree was rendered and entered and this appeal followed.

Plaintiff does not contend that the petition for change of venue fails to meet the statutory requirements nor is any issue made as to the adequacy of the notice given. He correctly states the law to be that a change of venue because of the prejudice of the judge must be sought before a hearing on the merits has commenced. He argues that the hearing on April 20, 1966, was a hearing on the merits, that the evidence adduced by

defendant was directly concerned with the merits of the case, and the order of court recites "Case called on the merits regarding the claim and the counterclaim".

The record contains the following statement of the trial court, made at the trial on June 27, 1966:

> "The April 20th hearing was on the merits subject to receipt of further evidence. In other words, the case was commenced on that day on the merits, and it was understood by all concerned we would not finish that day, and other evidence could be presented by either or both sides. The order entered on that day was a temporary order, and still remains in force. The only difference is the evidence presented was on the counterclaim at that time. Now we have the complaint only, which is a complaint for divorce."

It is true that to some extent the testimony of defendant and her witness at the hearing on April 20, 1966 is relevant to the issue of whether plaintiff was given cause to leave the parties' domicile, but upon examination, it appears to be equally relevant to the issue of whether plaintiff should be permitted to visit the child and have temporary custody.

In the absence of a showing of some reason for the court's permitting defendant to proceed with evidence on the counterclaim prior to plaintiff's proof on the complaint, and in view of the authorities hereafter cited and discussed, any ambiguity or doubt as to the nature of the hearing on April 20, 1966, for the purpose of reviewing the propriety of the court's denial of the petition for change of venue, must be resolved in favor of the defendant-petitioner.

In The People v. Chambers, 9 Ill. 2d 83, the Supreme Court said, at page 87: "The courts, in construing the venue provisions, have reiterated that they should receive a liberal rather than a strict

construction and should be construed to promote rather than to defeat the right to a change of venue, particularly where prejudice on the part of the judge is charged."

In Miller v. Miller, 43 Ill. App. 2d 214, the Appellate Court said, "The statute gives an absolute right to a change of venue to a petitioner, when his petition asserting the prejudice of the trial judge is duly made, verified, and filed in accordance with the statute. A change of venue is not a matter of practice but is a substantial right of a litigant."

[2] The reasons for the rule of liberal construction directed toward the granting, rather than the denial of this substantial right is well stated in Daniel Boone Woolen Mills v. Laedeke, 238 Ill. App. 92, wherein, at page 100, the court said: "It is unthinkable that, under our system of laws, a defendant may be required to submit his liberty and his estate to the disposal of a trial judge who is solemnly charged with prejudice against the accused."

It is clearly stated in the order of April 20 that the provisions for custody, support and visitation are temporary. It has been held that a hearing on temporary child support is not consideration of substantive issues. Jones v. Jones, 40 Ill. App. 2d 217.

[3] Upon a review of the record, we conclude that at the time of the presentation of the petition for change of venue, no hearing on the merits with respect to the substantive issues had commenced, and the trial court erred in holding that the petition was not

timely filed. All proceedings subsequent to the denial of the petition being void, (Johnson v. United Motor Coach Co., 66 Ill. App. 2d 295) the decree must be reversed and the cause remanded.

Decree reversed, cause remanded for a new trial.

Concur: Caswell J. Crebs

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

87 I.A.2d 281

No. 67-38

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SILAS HAMSON, Plaintiff-Appellant, -vs- MERVIL C. LIONBERGER, MARION J. LIONBERGER, DAISY MORGAN, JENNIE WEBB, and GERALD W. PECK, INDIVIDUALLY and as TRUSTEE FOR GERTRUDE IRVIN, Defendants-Appellees.	)	Appeal from the Circuit Court of Jefferson County, Illinois. Honorable Charles E. Jones, Judge Presiding.

George J. Moran, P.J.

This is an appeal from a judgment of the Circuit Court of Jefferson County, Illinois, entered for the defendants-appellees in an action to recover for breach of contract.

Defendants Mervil and Marion Lionberger, Morgan, Webb, and Irvin owned the property in question and will be referred to as the owners. Defendant Gerald Peck was alleged to be the agent of the owners and also in some of the pleadings is named as trustee for Irvin. For the sake of simplicity, any reference to Peck will be to him as an individual. In his role as trustee for Irvin, he will be included in the term "owners". The plaintiff had been leasing the property from the owners.

The present cause, trial court number 66-L-15, originated in January, 1966 when the plaintiff filed a complaint alleging that the defendants had breached an agreement wherein they had agreed orally and by a writing signed by Peck, to notify the plaintiff of any offer of purchase of the land and afford the plaintiff an opportunity to match such offers. Attached as an exhibit was a letter dated March 24, 1963, from Peck to the plaintiff stating that the owners agreed to give the plaintiff an opportunity to match any offers received.

The defendants filed a motion to dismiss, contending that a prior determination in the same court and between the same parties required that the present action be dismissed on the basis of res judicata and estoppel by verdict.

The prior cause, trial court number 63-2136, commenced with the filing of a complaint in December, 1963. Counts I and II were against the owners of the property seeking specific performance and damages for breach of contract. Count III was directed against Peck alleging false representation. All the defendants filed motions to dismiss on the grounds that the complaint involved a contract coming within the Statute of Frauds and that the plaintiff had failed to show that the statute had been complied with. The court entered an order granting the dismissal with leave to amend. In September and October, 1964, plaintiff was ordered to plead within 15 days. After further delays plaintiff filed an Amended Complaint against Peck only. On December 10, 1964, the court ordered the dismissal with prejudice of the original complaint against the owners. At the same time the court dismissed the Amended Complaint against Peck.

In March, 1965, plaintiff filed his Second Amended Complaint in 63-2136 against Peck. After further pleadings the case was set for trial. The plaintiff alleges that he then found the previously mentioned letter from Peck, and moved to add parties defendant, namely, the owners. Plaintiff also filed an amendment to the Second Amended Complaint directed against the owners and Peck, alleging failure to notify plaintiff of an offer of purchase. The court, after hearing arguments, entered an order denying the motion to add parties for the reason that the cause against the owners had been previously dismissed with prejudice, and denied the amendment to the Second Amended Complaint. This complaint, with Peck as the only remaining defendant, was set for trial for February 1, 1966. On January 28 plaintiff filed the present case and a motion for consolidation of causes. On April 5, 1966 the motion to consolidate was denied and in No. 63-2136 judgment was entered for the defendant, Peck. No appeal was made from this judgment.

Thereafter a hearing was had on the motions of the defendants to dismiss the present cause, No. 66-L-15, on the grounds of res judicata and estoppel by verdict. The court ruled in favor of the defendants. Plaintiff appeals.

To apply the doctrine of res judicata it is necessary that there be an identity of parties and of the causes of action.

"The rule ... on the subject of former adjudication ... is that if the first suit was between the same parties and involved the same cause of action, the judgment in the former suit is conclusive, not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action." City of Elmhurst v. Kegerreis, 392 Ill 195 at 203.

The plaintiff contends that the dismissal of the previous action against the owners was for want of prosecution, which is not a judgment on the merits and therefore the doctrine of res judicata is inapplicable. Regarding the action against Peck, the plaintiff contends that any matters which might or should have been litigated and were not so litigated resulted from the objections of Peck and the court's sustaining of the objections and therefore he should not be barred by the prior adjudication.

We will first consider the action against the defendant, Peck. There can be no doubt that there was a judgment on the merits, inasmuch as the prior case was tried and judgment was entered for the defendant. Since it is admitted that the parties are the same, the next question to be considered is whether the cause of action is the same. In the original case the plaintiff alleged that Peck falsely represented that he was the agent of the owners and that he had authority to enter into a contract for the sale of the property. In the present case it was alleged that Peck failed to notify plaintiff of any offers of purchase and thereby afford the plaintiff an opportunity to purchase the land. In each case plaintiff was stating that the defendant did not afford him an opportunity to purchase the land. The causes of action and the issues are the same. In cases where the second suit is based upon the same issue and between the same parties, the doctrine of res judicata applies not only to those questions presented, but also to those which could have been presented. Setliff v. Reinbold, 73 Ill App 2d 208, 213. The allegation of failure to notify is one that should have been presented in the original action and will not now be allowed as the basis for a new suit.

We next consider whether the dismissal of the action against the owners was a judgment on the merits. The order dismissing the action reads:

" ... and the court after hearing arguments of counsel and being fully advised in the premises finds that the plaintiff has failed to comply with the rule to plead entered by this court on the 19th day of October, 1964, and that the motion of the defendant ... should be granted; the Court further finds that the plaintiff is in default as to the Defendants ... for failure to comply with said rule to plead entered October 19, 1964.

It is therefore ordered that the Complaint of the plaintiff as against the Defendants ... be and the same is hereby dismissed with prejudice and the said Defendants ... ordered to go hence without day to recover their costs herein."

The appellant contends that the dismissal was for want of prosecution and not a judgment on the merits. There are Illinois cases which hold that dismissal for want of prosecution does not constitute a judgment on the merits. Motel v. Andracki, 299 Ill App 166, Wood v. Maxwell, 238 Ill App 597. In each of these cases the plaintiff had failed to prosecute, that is, a complaint was filed without further action on the part of the plaintiff and eventually the cases were dismissed. However, this differs from the present action where there was a hearing on the motion to dismiss and an order entered after the plaintiff failed to amend the complaint.

We believe that the principles set forth in In re Estate of Crane, 343 Ill App 327, are controlling. In that case the court sustained a motion to dismiss the complaint with leave to amend. The plaintiff failed to amend and the action was dismissed with prejudice. On appeal it was held that the dismissal with prejudice denoted that the trial court had passed upon the questions presented by the pleadings and was a judgment on the merits.

"We are not here concerned whether the court was, or was not justified in dismissing the suit 'with prejudice'. That order was a final and appealable one, and it must stand as the law in this case, because the now appellant did not see fit to appeal from that judgment...." Id at 345.

In the present case, the owners' motion to dismiss stated that plaintiff's complaint failed to state an action against them because the alleged agreement was in violation of the Statute of Frauds. There was a hearing on this motion and an order which sustained the motion. There was a hearing on the merits and the resulting dismissal "with Prejudice" was a judgment on the merits.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment Affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

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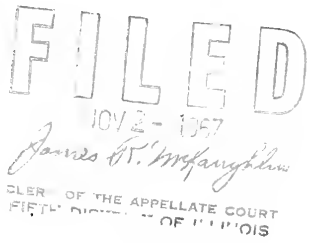

87 I.A.2 282

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10878 Agenda No. 67-56

Woodford County National Bank of El Paso, a National Banking Corporation, Plaintiff-Appellee vs. Fred Kurtz, Defendant-Appellant	Appeal from Circuit Court Woodford County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court.

Plaintiff, Woodford County National Bank of El Paso, and defendant, Fred Kurtz, entered into a certain agreement by the terms of which the defendant agreed to lease certain premises from the plaintiff, making the usual provisions customarily found in a lease. By the terms of paragraph 11 of that agreement, the defendant agreed to purchase and the plaintiff agreed to sell the leased premises subject to the plaintiff's acquiring title through a then existing foreclosure proceeding at a stated purchase price. The defendant deposited $1,000 with the plaintiff as earnest money to be held by the plaintiff pending

final settlement. This portion of the agreement between the parties then proceeds to provide for the payment of the balance of the purchase price, the proration of taxes, and the manner and nature of the defendant's acquiring title.

At the time of the agreement, the plaintiff was the purchaser of the subject property at a foreclosure proceeding and the period of redemption had not expired. The complaint in this case indicates that the plaintiff subsequently acquired title and tendered a deed in accordance with the purchase-and-sale terms of the agreement between the parties. The defendant refused to pay the purchase price and this action for specific performance was instituted. Three paragraphs of the complaint for specific performance and the answer of the defendant must be recited for a full understanding of the defendant's contention on appeal. Paragraph 3 of the complaint alleged:

> "That said contract was expressly contingent on plaintiff securing title through a certain mortgage foreclosure suit then pending in this Court, as Cause No. 64-CH-35, captioned Woodford County National Bank of El Paso vs. Woodford County Livestock Commission Co., Inc."

and the defendant's answer to that paragraph was:

> "Specifically denies the allegations of Paragraph 3 of the Complaint and alleges that this was a lease and not a contract of purchase."

Paragraph 6 of the complaint stated:

"That from and after the 29th of November, 1965, plaintiff has been, and still is, able, ready and willing to perform said contract on its part and upon the balance of said purchase price in the amount of $95,500 being paid to convey said premises to defendant by deed of warranty in accordance with said contract."

and defendant's answer to that paragraph was:

"Specifically denies the allegations of Paragraph 6 of the Complaint and states affirmatively that this was a lease and that the Defendant has fully performed."

Paragraph 7 of the plaintiff's complaint alleged:

"That on or about November 29, 1965 plaintiff by its undersigned attorneys tendered such deed to defendant and demanded payment of the balance of said purchase price; but defendant refused and still refuses to accept such conveyance and pay said balance."

and defendant's answer to that paragraph stated:

"Admits that on or about November 29, 1965, Plaintiff tendered a Deed to the Defendant and demanded payment for an alleged purchase price and admits that Defendant refused and still refuses to accept such conveyance and pay an alleged balance and further answering states affirmatively that this was a lease and that the Defendant has fully performed thereunder."

Plaintiff did not file a reply to the defendant's answer. The defendant moved for summary judgment on the basis of the allegations in the answer quoted above, which the trial court denied. The defendant then refused to participate in a hearing on the merits in his own behalf, although he was called as an adverse party by the attorney for the plaintiff and testified under section 60 of

the Civil Practice Act (Ill.Rev.Stat.1965, ch. 110, sec. 60) as a part of the plaintiff's case-in-chief. The trial court entered a decree requiring specific performance of the contract of sale and providing that in the event of nonperformance by the defendant, the plaintiff sell the property and apply the sale price to the balance due under the contract.

The defendant contends that the allegations in his answer that the agreement between the parties was a lease and that he understood it to be a lease, and not an agreement of sale, control the disposition of this case as a matter of law because the plaintiff failed to reply to these allegations.

Thus, the sole issue presented to us by this appeal is whether the trial court erred in denying the defendant's motion for summary judgment, based upon the alleged new matter set forth in the answer to which the plaintiff did not reply.

We find there was no error. It is true that a failure to reply to an affirmative defense is an admission of facts alleged therein. Mooney v. Underwriters at Lloyd's, London, 33 Ill. 2d 566, 213 N.E.2d 283 (1966). This rule, however, is applicable only to well-pleaded facts and has no application when we are dealing with the answerer's legal conclusions. Bratkovich v. Bratkovich, 34 Ill. App. 2d 122, 180 N.E.2d 716 (1st Dist. 1962). As the court stated in Croy Mfg. Co. v. Marks, 62 Ill. App. 2d 373, 379-80

(210 N.E. 2d 814, 817-18 (1st Dist. 1965)):

> ". . .The question presented is whether plaintiff, by failing to reply to the allegations set forth in defendant's answer, admitted the matters therein contained. Section 32 of the Civil Practice Act (Ill Rev Stats 1963, c 110, § 32) provides in part that '. . .if new matter by way of defense is pleaded in the answer, a reply shall be filed by the plaintiff.' Section 40(2) of the Practice Act (Ill Rev Stats 1963, c 110, § 40(2) provides that '. . . every allegation. . . not explicitly denies is admitted.'
>
> "Plaintiff's complaint affirmatively averred sale of the goods, and that there was an account stated between the parties. Defendant claimed in his amended answer that the goods were not purchased outright, but on a sale and return basis. In our opinion such allegation did not allege new matter, but was merely a denial that there had in fact been an unconditional sale. The complaint must be treated as being equivalent to a denial of the affirmative defense of sale and return, and no further negation by way of reply was necessary. In Riddle v. LaSalle Nat. Bank, 34 Ill App 2d 116, 180 NE2d 719 (1962) plaintiff had pleaded indebtedness and consideration on a promissory note. Defendants alleged no indebtedness and lack of consideration. No reply was filed by plaintiffs, and defendants' contention that the defenses were admitted was rejected."

Thus, in this case, there was no necessity for the plaintiff to file a reply and the absence of a reply did not mean that the trial court was thereby obligated to grant the defendant's motion for summary judgment. The action of the trial court was correct and is affirmed.

Affirmed.

SMITH and TRAPP, JJ., concur.

87 I.A. 315

51452

MELVIN A. PFAELZER,

Plaintiff-Appellee,

vs.

FLORENCE KOSTNER,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In this action lessee seeks to recover a security deposit of $800.00. Defendant-lessor counterclaimed for breach of certain covenants, alleging that alterations and changes were made in the leased apartment without consent of defendant-lessor and prayed for damages. During the trial it appears that the issue was principally confined to the question as to whether the changes made by the tenant were alterations as contended by lessor or needed repairs and improvements as claimed by lessee. The trial judge found for the plaintiff and defendant appeals.

The record shows that a written lease was entered into by the parties on September 17, 1957, for apartment 4 at 49 East Cedar Street in Chicago. Under the provisions of the lease the lessee agreed to make no alterations in the premises without the written consent of the lessor. In 1960, the plaintiff-lessee vacated the apartment and entered into a written guaranty agreement with the lessor that he would not be released from any liability on the lease during the term of the lease entered into between James and Virginia Saft, as lessees, and the lessor, which lease expired September 30, 1962. On January 9, 1963, plaintiff brought suit for the return of his deposit.

On appeal the defendant contends (1) that the trial judge erred in not granting a continuance when the absence of a material witness was brought to his attention; (2) that parol evidence was improperly admitted to vary an ambiguous written lease; (3) that a deposition was admitted into evidence contrary to Supreme Court Rule 19-7; and (4) that the

trial judge erred in not permitting the defendant to show the interest and bias of a certain witness.

When this case was reached for trial on March 2, 1966, the defendant made an oral motion for a continuance before Judge Harold Ward, the assignment judge, which was denied and the cause was assigned to Judge Richard A. Harewood for trial. The defendant's counsel renewed his motion for a continuance the same day before Judge Harewood. He orally informed the court that on the previous Monday, Mrs. Adele McNabb, a real estate broker with the firm of Browne and Storch, Inc., the rental agents, told him that she will not appear as a witness because her superior told her not to and that subsequently he was unable to serve her with a subpoena because she was avoiding service. He told the court that Mrs. McNabb signed a letter stating that plaintiff altered the ceiling in the premises under protest and had agreed to restore the ceiling to its original condition at the termination of the tenancy. Judge Harewood denied the motion on the ground that the matter was assigned to him for trial on that date by the assignment judge and he had no alternative but to proceed with the trial.

The defendant argues that the trial judge committed error in not allowing a continuance when the absence of a material witness was called to his attention. Supreme Court Rule 14 (1), Ill. Rev. Stat. 1965, ch. 110, §101.14 (1), provides that a motion for a continuance on account of the absence of material evidence shall be supported by an affidavit of the party or his agent, showing diligence and the particulars of the testimony of the absent witness. This rule was not followed as the defendant merely made an oral motion before both the assignment judge and the trial judge. We are constrained to hold that the denial of the motion for a continuance was properly within the discretion of the court. Ellick v. Clayton Motor Co., 16 Ill. App. 2d 151, 147 N.E.2d 400.

It is next contended that improper parol testimony which varied and contradicted the written lease was introduced to the effect that the premises were not in good repair when the Pfaelzers took possession of the premises. In the lease signed by plaintiff there was a provision that the apartment was in good order and repair and that he was satisfied with its physical condition. However, there was another provision requiring the lessee to do all necessary decorating and repair work and allowing the lessee $800.00 for doing this work. The dispute between the parties was whether the work was "decorating and repairs" or "alterations."

The Pfaelzers testified that the living room ceiling plaster was cracked and needed to be repaired; that the walls behind some antiquated mirrors were cracked; and that they made complete repairs and redecorated the apartment, including the floors, ceiling, plumbing and electric work at a cost over $5,000.00. They further testified that the defendant was present in the apartment on several occasions during the time the work was being performed and made no objections. Mr. Pfaelzer testified that the first time the defendant objected to the work was when he demanded the return of his deposit money. The trial judge in determining the issues in favor of the plaintiff stated that he found from the evidence that the improvements or alterations were accepted by the lessor and the lessor made no objection to the same when the sublease with the new tenant was entered into. Under the facts and circumstances we perceive no error in the admission of the aforementioned evidence.

It is claimed that the court erred in permitting plaintiff's counsel to read and have admitted into evidence a deposition of a witness which was not properly taken in accordance with Supreme Court Rule 19-7 (1). Ill. Rev. Stat. 1965, ch.110, §101.19-7(1). This rule states that, "A party desiring to take the deposition of any person upon written questions shall serve

them upon the other parties....Within 10 days thereafter a party so served may likewise serve cross questions." (Emphasis ours.) The record shows that the tenth day from the serving of the notice did not take place until after the trial was held, thus depriving the defendant of her rights under the aforesaid rule. This evidence was objected to and clearly inadmissible as it was a direct violation of the rule which would have given the defendant an opportunity to serve cross questions in preparation of the case. The plaintiff argues that if the aforementioned deposition was improperly admitted the error would be harmless and merely cumulative. We do not agree. It was also error for the trial judge to sustain an objection to a question asked of Mr. Pfaelzer as to whether this same witness was related by blood or marriage to either his wife or himself. In view of all the events in this case we are of the opinion that the cumulative errors in this trial were harmful errors and that the defendant was deprived of her right to a trial free of errors.

Accordingly, the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

Murphy, P. J. and
Adesko, J. concur.
(Abstract only)

51919

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
A. J. WILLIAMS, Defendant-Appellant.	)	COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant was found guilty of the unlawful sale of narcotic drugs. The evidence for the State primarily consisted of the testimony of two federal narcotics agents and an exhibit which was stipulated to contain heroin hydrochloride. On appeal, he contends entrapment was established, and he was not proved guilty beyond a reasonable doubt.

Clarence Cook, a federal narcotics agent of twenty months' service, testified he met defendant Williams at 424 South Central Park Avenue in Chicago on July 7, 1961, at about 2:00 P.M., in the apartment of a "special employee" from Cook's office. The special employee told defendant that Cook was interested in purchasing heroin. After some conversation with defendant, it was agreed that Cook would purchase from defendant a half-ounce for $250. Cook counted out $250 of official advance funds and asked what security he had for his money. Defendant pointed to his car in the street and said he would leave his car keys with Cook while defendant went to pick up the "stuff." At about 7:00 P.M. that evening, defendant Williams and the special employee's wife returned to the apartment, and Williams gave Cook a small manila envelope containing a quantity of white powder. Cook left the apartment and met surveillance agents, Halpin, Yelvington and Hnatt. They conducted a preliminary field test on the white powder, which resulted in a negative reaction, which meant that it contained no opiates or derivatives of opiates.

Cook returned to the special employee's apartment and waited until about 1:00 A.M. and then went home. About 4:20 A.M.

he received a telephone call from the special employee. Cook then drove to 75th and Vincennes, where he parked on Vincennes. At about 5:00 A.M., while Cook was sitting alone in his car, a car pulled up behind him, and defendant got out of the car and came to Cook's car and sat in the front seat with Cook. He gave Cook a small manila envelope containing a quantity of white powder. Defendant said that the first delivery was wrong, and he guaranteed that the second package contained "this stuff." Defendant left, and Cook met with Hnatt, where they performed a field test on the white powder, and it proved a positive reaction. During the trial it was stipulated that the package contained heroin hydrochloride.

Stephen R. Hnatt, a federal narcotics agent of about eighteen months' service, identified defendant and testified as to the surveillance of defendant by Agents Hnatt, Yelvington and Halpin, which commenced on July 6, 1961, at about 1:00 P.M. He saw Agent Cook and the special employee enter 424 South Central Park. " * * * at about 1:45 [P.M.] I saw the defendant, Mr. Williams, the special employee's wife and an unidentified colored male exit from 424 South Central Park. * * * At about 6:45 P.M. I saw the defendant, Mr. Williams, and the special employee's wife enter 424 South Central Park. About fifteen minutes later, approximately 7:00 P.M., I saw Agent Cook come out of 424 South Central Park, then followed him to Central Park and Polk, where we met, had conversation, and Agent Cook had in his possession a quantity of white powder. We tested the white powder with a Marquis reagent and noted a negative reaction."

Agent Hnatt further testified that at five o'clock in the morning [July 7, 1961], he saw the defendant at 75th and Vincennes. "I saw Mr. Williams leave his car. He walked up to Agent Cook's car, entered the car, he remained inside several minutes, and I then saw him re-enter his 1955 green and white Pontiac. I then followed Agent Cook to 76th and Perry, where I had conversation with him. He showed me the white powder that

he had in his possession. We tested it with a Marquis reagent and noted a positive reaction. We then proceeded to the Bureau of Narcotics office."

On cross-examination, Agent Hnatt testified that the special employee's name was Edward Edwards, and that as of July 6, a charge of sale of narcotics was pending against Edwards. Hnatt further testified on cross-examination that when Agent Cook left the special employee's apartment at 1:30 A.M., he followed Cook to his home and stayed with Cook until approximately 4:20, at which time they both drove separate vehicles to 75th and Vincennes. Hnatt parked his vehicle several car lengths behind Agent Cook's vehicle.

Agent Hnatt also testified that on July 28 [1961], he arrested defendant and took him to the office of the Bureau of Narcotics. At the time of the arrest, Hnatt was accompanied by Agents Halpin and Yelvington.

Richard Yelvington, a federal narcotics agent of two and one-half years' service, testified to the delivery of a package to him by Agents Cook and Hnatt early in the morning of July 7, 1961. He "re-field-tested" the package with a Marquis reagent, "and the reaction indicated that a derivative of opium was present in the white powder." He was not cross-examined. The record indicates that George Halpin, also a federal narcotics agent, was present in court during the trial. After the court inquired as to whether Halpin had "anything to add other than what has been testified to by the other agents," Halpin did not testify.

The defendant testified that he was a cab driver, and that the only times he had ever been arrested before was for disorderly conduct and for possession of a stolen gun. He further stated that he saw "Ed" [the special employee] on July 7 at about four o'clock in the morning in a restaurant near his cabstand. He did not see Ed the day before, and he had never been in Ed's apartment at 424 South Central Park. Defendant knew Ed previously, but he never had any dealing with him.

Defendant further testified that when he met Ed at about four o'clock in the morning, Ed was accompanied by a lady and man, and he was quite sure that it was Ed's "old lady." Ed asked him to take Ed and the other two people in his cab to 71st and Vincennes and gave him a special route to use. When they arrived at 71st and Vincennes, Ed told defendant to park his car behind "a parked car sitting just up the curb * * * a piece." Ed and the girl were in the back seat. When they parked the car, Ed said, "Would you take this package--there's a guy there in the car. I want you to take this package to him. I promised to do some things for him, and I didn't do it, and I don't want to talk to him. But you give him this package."

Defendant further testified he told Ed, "'Yes.' And I wasn't knowing what was in it. I didn't ask him. I didn't think at the time. I walks up to the car and went to give him the package. When I went to give this man sitting in this car the package I said, 'Ed--' when I went to tell him what Ed told me to tell him, he just reached in my hand and got it and pulled off fast across the street. And I stood there a moment and looked at him. And I went back to my car by Ed and I say, 'What's the matter with that guy? That man's crazy.' He say, 'Come back and take me to the west side. That's why I didn't want to talk to that fool,' he said." He believed the other car was a Mercury, and he had never seen the man before. He took Ed to 424 South Central Park and charged Ed $3.75 for the trip.

Defendant denied any previous conversation with Agent Cook and denied that Cook had given him $250 or any other sum at any time.

Defendant also testified that he saw Ed again about three weeks later in front of the cabstand. Ed asked him to deliver a package to a man who was in a parked car across the street. Defendant looked over at the man and said to Ed, "Is that the same fellow I delivered the package for you one morning out south?",

and Ed said, "Yes, that's that same fool." Defendant refused to make the delivery, and Ed "got mad with me for nothing." Defendant further stated that on the date he was arrested, he was beaten by the arresting officers and identified Halpin as one of the men.

Ernest C. Green, a witness for defendant, testified that the general reputation of the defendant in the community was good. It was stipulated that Leo Clar and Richard Walker would also testify the same.

At the close of all of the evidence, the court reviewed the evidence at length, and the court's remarks included, "I wasn't much impressed with the defendant's demeanor and his testimony, but I was very much impressed by the two federal officers who testified, both Mr. Cook and Mr. Hnatt. * * * [T]he defendant admits that meeting [75th and Vincennes Avenue], but his story is hardly believable or plausible, that someone would ask him to walk up there and deliver this package to someone at 5:00 o'clock in the morning. No, the story wasn't believable at all." The court then found defendant guilty as charged in the indictment and sentenced him to 10 years to 10 years and one day.

It is defendant's theory (1) that the only meaningful witness who testified in this cause was Agent Cook, and that the testimony of Agents Cook and Hnatt sets forth such an improbable chain of circumstances so as to render their entire testimony unworthy of belief; (2) that the court failed to take into consideration in determining the credibility of the aforesaid witnesses, the interest that each of them had in the outcome of the case as relating to their competency and efficiency as federal narcotics agents; and (3) that the testimony given by Agent Cook could have been, according to his version, corroborated by three independent witnesses, but the prosecution failed to produce such witnesses or to account for their failure to produce them, and finally the use by the narcotics agents of

Edward Edwards as a "special employee," who at that time had a pending charge of possession of narcotics against him, raises a strong presumption of entrapment or unlawful inducement, which were not negated by the prosecution in presenting its case.

[1] We find no merit in defendant's contention that his conviction cannot be sustained because the actions of the narcotics agent and the special employee constituted entrapment. We have examined the record on this point, and we conclude that the elements of entrapment were not present. People v. Clay, 32 Ill.2d 608, 610, 210 N.E.2d 221 (1965); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966).

[2,3] Where, as in the present case, there is no jury, it is the function of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony, and on review a conviction will not be set aside which rests on such matters, unless clearly erroneous and it is necessary to prevent injustice. People v. Lewis, 30 Ill.2d 617, 620, 198 N.E.2d 812 (1964).

[4,5] The failure of the State to call the three independent witnesses to corroborate the testimony of Agent Cook does not raise a presumption that the testimony would have been unfavorable to the State if they had produced the witnesses. See People v. Moore, 52 Ill. App.2d 27, 32, 201 N.E.2d 619 (1964). The testimony of a single witness to an unlawful sale of narcotics, if positive, is sufficient to convict even where such testimony is contradicted by the accused. People v. Frank, 51 Ill. App.2d 251, 256, 201 N.E.2d 627 (1964).

[6] It is our conclusion that the proof was sufficient and satisfactory to establish defendant's guilt beyond a reasonable doubt. Therefore, the judgment of the Circuit Court is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

87 I.A.2 452

51664

EDWARD HOWARD MEHLENBACHER, JR., Administrator of the Estates of DOROTHY MEHLENBACHER & TOD MEHLENBACHER, a minor, deceased, and HERBERT TATE, Plaintiffs-Appellees,

v.

ELGIN, JOLIET & EASTERN RAILROAD COMPANY, a corporation, & STEVE BAYCI, Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order which granted the plaintiffs' petition to vacate the dismissal of their cause of action.

The defendants contend that the plaintiffs did not act with due diligence in presenting their petition and that their petition, which was brought under section 72 of the Civil Practice Act (Ill.Rev.Stat., 1965, chap. 110, sec. 72), did not establish any ground for the relief granted.

The record, petitions and affidavits disclose that the case was filed in March 1961. On February 4, 1965, the case was set for a pretrial conference, but no one appeared for the plaintiffs. The conference was continued to February 18th and the trial judge instructed his clerk to so inform the plaintiffs' attorneys. On February 18th the plaintiffs again failed to appear and the judge, after being told by his clerk that the plaintiffs' attorneys had been informed that the case was scheduled for that date, dismissed the case for want of prosecution.

On March 2, 1965, the defendants' lawyers, who had been present at both pretrial hearings, were served with notice by the plaintiffs that they would, on March 12th, move to vacate the dismissal order of February 18th. The motion was not presented on

March 12, 1965. Although the defendants were in court, no one appeared for the plaintiffs.

Almost a year later, on February 23, 1966, the court, without a motion having been filed and without the defendants having been notified, vacated the dismissal. This order was subsequently expunged.

On May 9, 1966, the plaintiffs, for the first time, filed a motion and a petition to vacate the order of February 18, 1965. This petition was withdrawn and a second one was filed on June 3, 1966, under section 72 of the Civil Practice Act. The petition was granted on June 30, 1966.

The plaintiffs' petition alleged that on February 18, 1965, the judge's clerk telephoned the office of the plaintiffs' attorney and stated the conference would be continued to another date. It further alleged that shortly thereafter the attorney was appointed a magistrate of the Circuit Court of Cook County and transferred the case to another lawyer. The new attorney learned of the dismissal late in February and prepared a motion to reinstate the case which he planned to file before a motion judge on March 12, 1965. Prior to that date he was apprised that only the trial judge could vacate the dismissal order. He then consulted the trial judge's clerk and was told the dismissal was a mistake and the order would be vacated. In February 1966 he checked the court file and saw that the order of dismissal had not been vacated.

To be entitled to relief under section 72 a petitioner must show that he and his attorney have exercised due diligence. Washington Mfg. Co. v. American Uniform Rental Co., 73 Ill.App.2d 49, 218 N.E.2d 499 (1966). Reasonable diligence is required not only in discovering facts which would have prevented the court

from entering its order, but also in presenting these facts to the court. Panion v. Checker Taxi Co., 53 Ill.App.2d 364, 202 N.E.2d 852 (1964). The remedy provided by section 72 was not designed to relieve a party of the consequences of his own neglect. Till v. Kara, 22 Ill.App.2d 502, 161 N.E.2d 363 (1959). The petition is addressed to the equitable powers and the legal discretion of the court and it is only when there is an abuse of discretion that a reviewing court will interfere with the trial court's decision. Stackler v. Village of Skokie, 53 Ill. App.2d 417, 203 N.E.2d 183 (1964); Dann v. Gumbiner, 29 Ill.App. 2d 374, 173 N.E.2d 525 (1961).

In the instant case the plaintiffs' attorney learned of the dismissal within two weeks after the entry of the order, yet over fourteen months went by before a petition to reinstate the case was filed. The excuse offered for this extraordinary delay was that the trial judge's clerk told the attorney in March 1965 that the dismissal was a mistake and would be vacated, and that the attorney did not check the court file until February 1966. An order entered by a judge cannot be vacated by his clerk, and it is unreasonable for an attorney to rely upon a clerk's statement that an order would be vacated rather than presenting a motion to the judge to set it aside. Moreover, the attempted justification for the first delay, even if it could be accepted as valid, nonetheless does not explain the further delay of three months from the time in February 1966 when the attorney checked the court file to the time in May when the first petition to reinstate was filed. Section 72 does not relieve a party of the consequences of the carelessness of his counsel. Antczak v.

Antczak, 61 Ill.App.2d 404, 209 N.E.2d 838 (1965).

The plaintiffs had the burden of showing a sufficient basis for vacating the dismissal order. Brockmeyer v. Duncan, 18 Ill.2d 502, 165 N.E.2d 294 (1960). They did not make such a showing. To the contrary, the record shows a woeful lack of diligence in moving to vacate the order of dismissal. The trial court should not have granted the petition and its order is reversed.

Reversed.

Sullivan, P.J., and Schwartz, J., concur.